

**H.R. 4366, “SAN LUIS UNIT DRAINAGE
RESOLUTION ACT”; H.R. 5217, “SAN
LUIS UNIT DRAINAGE RESOLUTION
ACT”; AND DISCUSSION DRAFT OF
H.R. _____, “BLACKFEET WATER
RIGHTS SETTLEMENT ACT OF 2016”**

LEGISLATIVE HEARING

BEFORE THE
SUBCOMMITTEE ON WATER, POWER AND OCEANS
OF THE
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

Tuesday, May 24, 2016

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LEGISLATIVE HEARING ON H.R. 4366, TO AFFIRM AN AGREEMENT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT DATED SEPTEMBER 15, 2015, AND FOR OTHER PURPOSES, "SAN LUIS UNIT DRAINAGE RESOLUTION ACT"; H.R. 5217, TO AFFIRM "THE AGREEMENT BETWEEN THE UNITED STATES AND WESTLANDS WATER DISTRICT" DATED SEPTEMBER 15, 2015, "THE AGREEMENT BETWEEN THE UNITED STATES, SAN LUIS WATER DISTRICT, PANOCHÉ WATER DISTRICT AND PACHECO WATER DISTRICT", AND FOR OTHER PURPOSES, "SAN LUIS UNIT DRAINAGE RESOLUTION ACT"; AND DISCUSSION DRAFT OF H.R. ____, TO AUTHORIZE AND IMPLEMENT THE WATER RIGHTS COMPACT AMONG THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, THE STATE OF MONTANA, AND THE UNITED STATES, AND FOR OTHER PURPOSES, "BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2016"

**Tuesday, May 24, 2016
U.S. House of Representatives
Subcommittee on Water, Power and Oceans
Committee on Natural Resources
Washington, DC**

The subcommittee met, pursuant to notice, at 10:35 a.m., in room 1334, Longworth House Office Building, Hon. John Fleming [Chairman of the Subcommittee] presiding.

Present: Representatives Fleming, McClintock, Gosar, LaMalfa, Denham, Bishop, Huffman, Napolitano, Costa, and Torres.

Dr. FLEMING. The Subcommittee on Water, Power and Oceans will come to order. The subcommittee meets today to hear testimony on H.R. 4366, sponsored by Mr. Valadao; H.R. 5217, sponsored by Mr. Costa; and the discussion draft on the "Blackfeet Water Rights Settlement Act of 2016."

Before we begin, I ask unanimous consent that our non-subcommittee colleagues, Mr. Valadao and Mr. Zinke, be allowed to join us on the dais and participate at the appropriate time in the hearing if time permits.

[No response.]

Dr. FLEMING. Hearing no objection, so ordered.

I will now yield myself 5 minutes to make my opening statement.

STATEMENT OF HON. JOHN FLEMING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Dr. FLEMING. Today's hearing involves an examination of water-related settlements between the Federal Government and non-Federal parties.

These complex and bipartisan settlements are the results of decades of litigation, claims, and negotiations, and are intended to provide certainty for all the parties involved. But, they also involve

Federal dollars. Louisianans and other American taxpayers are being asked to pay for some parts of these settlements, so there are legitimate questions about the Federal costs and the benefits of these bills.

One of the most important questions involving a settlement, especially when American taxpayer dollars will be used, is whether resolving the litigation will be advantageous to the Federal Government compared to its liability under current law.

For many years, these questions were either ignored or not adequately answered on a bipartisan basis. Congress was simply viewed at times as a final rubber stamp for approving costly settlements, or forced to be an arbitrator on fiscal expenditures even though it did not have the key information needed to make a decision.

Times have changed. With an over \$19 trillion debt, we need to figure out whether these and other settlements are in the best interests of the American taxpayer. It is not responsible to make these assessments in a vacuum. And that's why the Chairman of this Committee, Rob Bishop, asked the current Interior Secretary and the former Attorney General last year to provide more information on future Indian water rights settlements in order to ensure that they are fiscally responsible and justified. I ask unanimous consent to enter that letter into the Record.

[No response.]

Dr. FLEMING. Hearing no objection, so ordered.

[The information follows:]

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON NATURAL RESOURCES,
WASHINGTON, DC

February 26, 2015

Hon. Eric Holder, Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Hon. Sally Jewell, Secretary
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Mr. Attorney General and Madame Secretary:

The House Natural Resources Committee (Committee) has primary authorizing jurisdiction over the legislative resolution of Indian water rights claims within the House of Representatives. Additionally, given the longstanding policy of the United States that disputes regarding Indian water rights should be resolved through negotiated settlement rather than through litigation, both of your Departments play key roles in negotiating and developing settlements regarding these claims before they are ever considered by Congress.

The Committee recognizes that settlements to these matters are generally preferable to protracted litigation, which does little to provide water supply and financial certainty for settling and other parties. Importantly, settlements, if crafted correctly, can also provide relief to the United States from burdensome legal obligations and benefit all American taxpayers. The Committee recognizes that the Executive branch is charged with implementing existing Indian water rights settlement criteria and procedures designed to meet these goals.¹

¹Department of the Interior Working Group on Indian Water Settlements for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, Federal Register, Vol. 55, No. 48, March 12, 1990.

Due to the direct linkage between your efforts in negotiating the proposed resolution of these claims and our responsibility in enacting such proposals both for the benefit of the United States interests and to help Tribal and non-tribal parties, it is important that we work together to facilitate Congressional consideration when you have reached resolution.

Due to growing federal debt and increased budgetary pressures from existing Indian water rights settlements, it is important that the proposed settlements, their proposed legislation and the federal costs associated with them be fiscally responsible and justified in order to protect the American taxpayer and future Tribal needs.

As Chairman of the Committee, I write this letter to inform you of the process that the Committee intends to follow when considering future Indian water rights settlements during this Congress and to inform you of the assistance the Committee will need from you and your designees in order to proceed forward.

Given the role your Departments have in negotiating each proposed settlement, to help expedite the Committee's consideration of proposed legislation enacting such settlement that is fiscally responsible, your departments—in concurrence with the Office of Management and Budget—must also play a significant and initial role in certifying and explaining the Administration's support of the financial aspects of legislation codifying such settlement to the Committee. Put simply, your Departments must convey support for and forward the settlements and the proposed authorizing legislation, specifically including federal spending levels, before any Committee consideration takes place.

To that end:

1. I anticipate each of you will provide a statement to the Committee affirming that each proposed settlement resolution transmitted by your Department adheres to the current criteria and procedures.
2. I ask that your Departments specifically affirm to the Committee that a settlement meets Criteria 4² and 5(a) and (b)³ to ensure that the American taxpayer is deriving benefits from any such settlement prior to Committee consideration. Related to such determination, both Departments will be expected to affirm that a particular settlement represents a net benefit to the American taxpayer as compared to the consequences and costs of not settling litigation, and specifically support the federal financial authorization included in the proposed legislative text.
3. For settlement legislation to be considered, the Attorney General or his/her designee must have conveyed to a court and all settling parties have agreed, in writing, to the settlement pending a legislative resolution before it is forwarded to the Committee for it to be considered.
4. Both Departments and the settling parties must have approved, in writing, the legislative text needed to codify the settlement before it is transmitted to the Committee and have provided that proposed text to the relevant court.
5. Based on precedent,⁴ the Committee requests that the Department of Justice consent to being available to testify if any legislative text is considered by the Committee related to such proposals.
6. Both Departments must list the legal claims being settled in any document transmitting legislative text; and
7. Such settlements and proposed legislation shall not include financial authorizations for claims already settled by Congress or claims that have no legal basis.

²Criteria 4, as included in Federal Register, Vol. 55, No. 48, March 12, 1990 states: "The total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government."

³Criteria 5(a) and (b), as included in Federal Register, Vol. 55, No. 48, March 12, 1990 state: "Federal contributions to a settlement should not exceed the sum of the following two elements: a. First, calculable legal exposure—litigation costs and judgment obligations if the case is lost; Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, likelihood of loss. b) Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedence.)—Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process."

⁴Testimony of Mr. Peter Steenland, Appellate Section Chief, Department of Justice, before the Joint Hearing on S. 2259 before the Subcommittee on Water and Power of the Senate Committee on Energy and Natural Resources and the Senate Committee on Indian Affairs, S. Hrg. 103-943, Aug. 4, 1994.

The actions of your Departments, as outlined above, will play a very critical role in expediting the Committee's consideration of these important settlement efforts. If your Departments follow this process—starting with settlement legislation being proposed and supported by the Administration—it is my intent to then introduce the settlement legislation at the Administration's request and consider such legislation in the Committee at the appropriate time. In conclusion, it is my intent that your actions prior to Committee consideration will determine whether negotiated settlements proceed in the legislative process.

I look forward to working with you to help achieve fiscally responsible settlements that help federally recognized tribes, other settling parties and the American taxpayer.

Sincerely,

ROB BISHOP,
Chairman.

Dr. FLEMING. He asked the Administration to send documentation on seven requests before Congress would consider these settlements. This Administration, to its credit, responded favorably and our staff have worked together on this new protocol over the last 15 months.

As a result, we have a recent Administration letter on the Blackfeet Settlement before us today that answers many of these questions. A letter was also sent on the proposed Pechanga Settlement, but it did not make the deadline necessary to add it to today's agenda. At some point soon, we may consider that settlement.

The letters on both these settlements responded to many of Chairman Bishop's requests. But one of the key ones was not definitively answered. Specifically, the Bishop letter requests that the Administration affirm that a settlement meets long-standing Federal criteria in place to determine that the "total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government."

[Slide]

Dr. FLEMING. As the television screen indicates, both the Blackfeet and Pechanga letters stated that "the Office of Management and Budget advises that it is still assessing and evaluating the information necessary for it to definitely conclude whether the proposed settlement meets all of the criteria and procedures."

While Congress has more information than ever before, we simply don't have all of it yet, especially as it relates to the net benefits of these two water rights settlements. On the other hand, the Administration was very specific in providing the net benefits and costs on the drainage settlement before us today, as evidenced by the chart on the television screen.

These are well-intended settlements and I commend those of you who have worked so hard on getting these bills to this important juncture. But, as I pointed out, more information is necessary from the Administration. We also need to work with the Congressional Budget Office to determine, prior to further consideration, what these bills would cost, or perhaps reduce the costs of, the Federal Government.

The American people have asked for and deserve transparency and accountability so their taxpayer dollars are spent wisely. This

hearing will help examine these settlements in that context. I look forward to today's testimony.

[The prepared statement of Dr. Fleming follows:]

PREPARED STATEMENT OF THE HON. JOHN FLEMING, CHAIRMAN, SUBCOMMITTEE ON
WATER, POWER AND OCEANS

Today's hearing involves an examination of water-related settlements between the Federal Government and non-Federal parties.

These complex and bipartisan settlements are the results of decades of litigation, claims and negotiations and are intended to provide certainty for all parties involved. But, they also involve Federal dollars. Louisianans and other American taxpayers are being asked to pay for some parts of these settlements, so there are legitimate questions about the Federal costs and benefits of these bills.

One of the most important questions involving a settlement—especially when American taxpayer dollars will be used—is whether resolving the litigation will be advantageous to the Federal Government compared to its liability under current law. For many years, these questions were either ignored or not adequately answered on a bipartisan basis. Congress was simply viewed at times as a final rubber stamp for approving costly settlements or forced to be an arbitrator on fiscal expenditures even though it did not have the key information needed to make a decision.

Times have changed. With an over \$19 trillion dollar debt, we need to figure out whether these and other settlements are in the best interests of the American taxpayer. It is not responsible to make these assessments in a vacuum. And that's why the Chairman of this Committee, Rob Bishop, asked the current Interior Secretary and the former Attorney General last year to provide more information on future Indian water rights settlements in order to ensure that they are fiscally responsible and justified.

I ask unanimous consent to enter that letter into the Record—hearing no objection, so ordered.

He asked the Administration to send documentation on seven requests before Congress would consider these settlements. This Administration, to its credit, responded favorably and our staff have worked together on this new protocol over the last 15 months. As a result, we have a recent Administration letter on the Blackfeet Settlement before us today that answers many of these questions. A letter was also sent on the proposed Pechanga Settlement but it did not make the deadline necessary to add it to today's agenda. At some point soon, we may consider that settlement.

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The American people have asked for and deserve transparency and accountability so their taxpayer dollars are spent wisely. This hearing will help examine these settlements in that context. I look forward to today's testimony.

Dr. FLEMING. The Chair now recognizes the Ranking Member, Mr. Huffman, for his statement.

**STATEMENT OF HON. JARED HUFFMAN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. HUFFMAN. Thank you, Mr. Chairman; and welcome to the witnesses. I am glad to be here today to examine three bills that do deserve our attention. On today's agenda we have the Blackfeet Water Rights Settlement Act, to approve a much-needed Indian water rights settlement for the Blackfeet Tribe in Montana. This, I believe, is good public policy and ought to move quickly through the committee.

However, the two other bills on today's agenda would approve a legal settlement agreement recently reached between the Federal Government and the Westlands Water District, which is missing significant environmental and budgetary safeguards, and should give every member of this committee serious pause.

The settlement agreement would relieve the Federal Government of an obligation under a 56-year-old law to build an interceptor drain for the Westlands Water District. In exchange, the settlement agreement calls for nearly \$400 million in a taxpayer bailout for the Westlands Water District. The drainage legislation would also approve a not-yet-finalized drainage agreement with the so-called Northerly Area Water Districts.

I want to be very clear that both of the two bills we are considering in this regard specifically direct Department of the Interior to implement the "Northerly Area" agreement. Members of this committee have never seen that agreement. The public has never seen that agreement. The water utilities that would benefit from that agreement did not show up today to testify in favor of it; and we just learned late last night that the Department of the Interior now says that they cannot even testify in favor of that agreement, despite ostensibly supporting at least one of these bills, due to an ongoing Inspector General investigation that we did not even know was pending until we learned about it last night.

Mr. Chairman, there are red flags and smoking guns all over this subject matter, and it begs the question of why the House is considering supporting an agreement sight unseen, and why we are even holding the hearing on these two implementing bills today. But since we are here, it is appropriate to start with some history.

Fifty-six years ago, Congress passed the San Luis Act of 1960, which authorized construction projects to provide irrigation water for certain agricultural lands in Merced, Fresno, and Kings County. Recognizing that much of that land was very saline and poorly drained soil, the San Luis Act required the state of California or the Federal Government to agree to build an interceptor drain.

The Bureau of Reclamation eventually agreed to build the drain after the legislation passed, and in 1968 they began construction of a 200-mile drain to transport the drainage wastewater from the San Luis Unit, and discharge it into the Delta. After significant public concern about dumping drainage wastewater into the Delta, which happens to be California's most important drinking water source, the Federal Government stopped construction of the drain at a place called the Kesterson Reservoir.

[Slide]

Mr. HUFFMAN. The picture that you are looking at right now is why in the 1980s the Kesterson Reservoir became infamous across

the Nation, because it was revealed that this toxic drainage wastewater from Westlands and the San Luis Unit contained a highly toxic element called selenium, which is common in the soils of that area, but deadly in high concentrations to both humans and wildlife.

The effects of this drainage wastewater on wildlife shocked the country. What we saw was severe mortality and deformities among waterfowl in Kesterson. And, again, this photo is an example of what shocked the Nation at that time.

So, in 1986 the Bureau of Reclamation closed the drain serving the San Luis Unit because of these selenium concerns. Folks within the San Luis Unit sued the Federal Government, and court rulings subsequently found that unless that old law is amended, that the Department of the Interior still has an obligation to provide drainage service to Westlands and the San Luis contractors.

So, here we are today, with legislation that would amend the San Luis Act of 1960, but with a big catch. In exchange for amending that law, which I think almost everyone now agrees should not have contained this taxpayer obligation in the first place to finance a boondoggle drain for these lands, the settlement agreement requires taxpayers to provide a \$400 million bailout for Westlands and the San Luis water contractors on top of the millions they receive already in taxpayer subsidies.

Now, the Westlands Water District has some of the largest and wealthiest corporate farms in the world. They boast \$1 billion in crop sales every single year. Yet, in this agreement, they are demanding nearly \$400 million in a bailout to simply agree to go along with a common-sense change in Federal law to acknowledge that this interceptor drain, that cannot be built because there is nowhere to put this toxic drain water, should not have to be built.

Some have claimed that this deal actually saves taxpayers money, because if Westlands forces taxpayers to finance a drain, it would cost much more than the bailout we are giving in this agreement. We are going to hear from a witness today that that is actually not the case.

And while my time is out, Mr. Chairman, we could spend this entire day talking about the examples in which the interests of the Westlands Water District are being elevated above the interests of taxpayers, the interests of the environment, and the interests of other water users as well, which we will hear about in a little while. I look forward to the discussion.

[The prepared statement of Mr. Huffman follows:]

PREPARED STATEMENT OF THE HON. JARED HUFFMAN, RANKING MEMBER,
SUBCOMMITTEE ON WATER, POWER AND OCEANS

Thank you, Mr. Chairman, and welcome to the witnesses.

I'm glad to be here today to examine three bills that do deserve our attention. On today's agenda we have the Blackfeet Water Rights Settlement Act, to approve a much needed Indian water rights settlement for the Blackfeet Tribe in Montana. This, I believe, is good public policy and ought to move quickly through the Committee. However, the other two bills on today's agenda would approve a legal settlement agreement recently reached between the Federal Government and the Westlands Water District, which is missing significant environmental and budgetary safeguards, and should give every member of this committee serious pause.

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District. And in exchange, the settlement agreement calls for nearly \$400 million in a taxpayer bailout for the Westlands Water District. The drainage legislation would also approve a not-yet-finalized drainage agreement with the so-called Northerly Area water districts.

I want to be very clear that both of the two bills we're considering in this regard specifically direct the Department of the Interior to implement the "Northerly Area" agreement. Members of this committee have never seen that agreement; the public has never seen that agreement. The water utilities that would benefit from that agreement did not show up today to testify in favor of it, and we just learned late last night that the Department of the Interior now says that they can't even testify in favor of that agreement despite ostensibly supporting at least one of these bills due to an ongoing Inspector General investigation that we didn't even know was pending until we learned about it last night.

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The Bureau of Reclamation eventually agreed to build a drain after the legislation passed, and in 1968 they began construction of a 200-mile drain to transport the drainage wastewater from the San Luis Unit and discharge it into the Delta. After significant public concern about dumping drainage wastewater into the Delta, which happens to be California's most important drinking water source, the Federal Government stopped construction of the drain at a place called the Kesterson Reservoir.



The picture that you're looking at right now is why the Kesterson Reservoir in the 1980s became infamous across the Nation, because it was revealed that this toxic drainage wastewater from Westlands and the San Luis Unit contained a highly toxic element called selenium, which is common in the soils of that area, but deadly in high concentrations to humans and wildlife. The effects of this drainage wastewater on wildlife shocked the country. What we saw was severe mortality and deformities among waterfowl in Kesterson, and again this photo is an example of what shocked the Nation at that time.

And so in 1986, the Bureau of Reclamation closed the drain serving the San Luis Unit because of these selenium concerns, folks within the San Luis Unit sued the Federal Government, and court rulings subsequently found that unless that old law is amended, that the Department of the Interior still has an obligation to provide drainage service to the Westlands and the San Luis contractors.

So, here we are today, with legislation that would amend the San Luis Act of 1960. But, with a big catch.

In exchange for amending that law—which I think almost everyone now agrees should not have contained this taxpayer obligation in the first place to finance a boondoggle drain for these lands—the settlement agreement requires taxpayers to provide a \$400 million bailout for Westlands and the San Luis water contractors on top of the millions they receive already in taxpayers subsidies. Now the Westlands Water District has some of the largest and wealthiest corporate farms in the world. They boast a billion dollars in crop sales every single year. And yet in this agreement they're demanding nearly \$400 million in a bailout to simply agree to go along with a common-sense change in Federal law to acknowledge that this interceptor drain that can't be built because there's nowhere to put this toxic drain water shouldn't have to be built.

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While my time is out, Mr. Chairman, we could spend this entire day talking about the examples in which the interests of the Westlands Water District are being elevated above the interests of taxpayers, the interests of the environment, and the interests of the other water users, which we'll hear about in a little while as well, and I look forward to the discussion.

Dr. FLEMING. I thank the gentleman.
The Chair now recognizes Dr. Gosar.

**STATEMENT OF HON. PAUL A. GOSAR, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA**

Dr. GOSAR. Thank you, Chairman, for holding this hearing.

Arizona is home to 22 federally recognized American Indian tribes, has the second largest American Indian population, and reservation land covers over a quarter of the state, making Indian water rights settlements one of the most important issues facing Arizonans.

[Slide]

Dr. GOSAR. Tribal and non-tribal communities, water and power users, the state, and the Federal Government have a long history of working together on complex Indian water rights settlements. Ten such settlements in Arizona, or portions of them, as listed here on the TV screen, have been enacted by Congress, and there are more on the horizon, depending on negotiations.

These settlements can be a significant benefit to tribal communities who have decades of water claims. They can remove clouds of litigation uncertainty for water and power ratepayers and industries. They can reduce Federal liability to benefit the American taxpayer. They can also protect and promote jobs, like the 4,000 mining jobs affiliated with the no-Federal-cost Bill Williams River Water Rights Settlement Act that Senator Jeff Flake and I sponsored in the last Congress. When done properly, they can be a win-win for everyone involved.

Although recent ones have not cost taxpayers a dime, some, like the Blackfeet legislation before us will cost Federal money, due in part to the Federal-tribal trust responsibility.

Since there is a Federal funding backlog on existing Indian water rights settlements, we have a growing national debt, and many of our non-Western colleagues are not familiar with the Winters

Doctrine and tribal water, it is important that Congress is educated and making informed decisions on future settlements.

That is why Chairman Bishop's February 2015 letter and the Administration's complete answers to it can help pave the way for consideration of these important matters. It is my hope that the Administration, which has been acting in good faith so far, will provide all the answers necessary to move forward on the Blackfeet, Pechanga, and additional settlements. No one, except for a few so-called environmental groups, prefers endless litigation, and with these settlements, with more information, we can help provide a blueprint for water certainty and taxpayer relief.

The San Luis drainage bills before us today aim to achieve that, as well. This Administration concluded that it is responsible under Federal law for building a multi-billion dollar irrigation drain, and instead negotiated with local irrigation districts to go another route that could potentially save billions of dollars. Meanwhile, the irrigation district that has helped pay for a drain that was never built will get some of its money back. But it is also indemnifying the United States from liability for the damages associated with failing to provide the drainage.

Nothing is ever perfect in a negotiated water-related settlement, but I want to applaud these parties here today who have worked together to achieve a better future for their communities. I also want to commend Mr. Zinke, Mr. Valadao, and Mr. Costa for their leadership on these bills. I look forward to getting more answers today and into the future for these well-intentioned efforts.

Thank you, sir.

[The prepared statement of Dr. Gosar follows:]

PREPARED STATEMENT OF THE HON. PAUL A. GOSAR, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ARIZONA

Thank you for holding this hearing.

Arizona is home to 22 federally recognized American Indian tribes, has the second largest American Indian population and reservation land covers over a quarter of the state, making Indian water rights settlements one of the most important issues facing Arizonans.

Tribal and non-tribal communities, water and power users, the state and the Federal Government have a long history of working together on complex Indian water rights settlements. Ten such settlements in Arizona—or portions of them—as listed here on the TV screen have been enacted by Congress and there are more on the horizon depending on negotiations.

These settlements can be a significant benefit to tribal communities who have decades of water claims; they can remove clouds of litigation uncertainty for water and power ratepayers and industries and they can reduce Federal liability to benefit the American taxpayer. They can also protect and promote jobs—like the 4,000 mining jobs affiliated with the no-Federal cost Bill Williams River Water Rights Settlement law that Senator Jeff Flake and I sponsored in the last Congress. When done properly, they can be a win-win for everyone involved.

Although recent ones have not cost taxpayers a dime, some like the Blackfeet legislation before us will cost Federal money due, in part, to the Federal tribal trust responsibility. Since there's a Federal funding backlog on existing Indian water rights settlements, we have a growing national debt and many of our non-western colleagues are not familiar with the Winters Doctrine and tribal water, it's important that Congress is educated and making informed decisions on future settlements.

That's why Chairman Bishop's February 2015 letter and the Administration's complete answers to it can help pave the way for consideration of these important matters. It's my hope that the Administration, which has been acting in good faith so far, will provide all the answers necessary to move forward on the Blackfeet, Pechanga and additional settlements. No one, except for a few so-called environ-

mental groups, prefers endless litigation, and these settlements, with more information, can help provide a blueprint for water certainty and taxpayer relief.

The San Luis Unit drainage bills before us today aim to achieve that as well. This Administration concluded that it's responsible under Federal law for building a multi-billion dollar irrigation drain and instead negotiated with local irrigation districts to go another route that could potentially save billions of dollars. Meanwhile, the irrigation district that has helped pay for a drain that was never built will get some of its money back but it is also indemnifying the United States from liability for the damages associated with failing to provide drainage.

Nothing is ever perfect in a negotiated water-related settlement, but I want to applaud these parties here today who have worked together to achieve a better future for their communities. I also want to commend Mr. Zinke, Mr. Valadao and Mr. Costa for their leadership on these bills. I look forward to getting more answers today and into the future on these well-intentioned efforts.

Dr. FLEMING. I thank the gentleman.

The Chair now recognizes Mrs. Napolitano for her remarks.

STATEMENT OF HON. GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you very much. I do have some comments, but I think I will reserve most of them until the witnesses are here.

I do have grave concerns over this. First of all, I do not see any provision that if the agreement is to go through, whether—in the future—that land is sold for a profit to some other entity. I just want to say I look forward to it, and I would yield to Mr. Huffman.

Mr. HUFFMAN. I thank the gentlelady. I was just going to point out that the argument that this is somehow saving the taxpayers money is at odds with the fact that if the Federal Government were required to somehow build this drain under existing law, the Westlands Water District would have to pay for that. They would have to fully repay the taxpayers of the United States. Yet, under this agreement, there is no such protection for the taxpayers.

Also, environmental and water quality safeguards are completely missing from this deal. These are important. Going all the way back to folks who looked at this in prior administrations, the Bush administration, and at the state level, the Schwarzenegger administration, the importance of environmental and water quality safeguards in any drainage deal for this area has always been stressed. Yet, there are absolutely none in this agreement.

Finally, it is important to note the need for robust enforcement and performance standards in any agreement like this, especially in light of recent charges against Westlands by the Securities and Exchange Commission. Just 2 months ago, the SEC charged Westlands for misleading investors—and I quote—“misleading investors about its financial condition as it issued a \$77 million bond offering.” And they noted that Westlands’ General Manager, Mr. Birmingham, who we will be hearing from today, described their extraordinary accounting transactions as “a little Enron accounting.”

Anyone who compares their business tactics to a company whose collapse exposed one of the largest accounting frauds in corporate history should not be trusted so lightly with a waiver of nearly \$400 million owed to the U.S. Treasury, much less a permanent water contract or carte blanche to manage the toxic discharge

problem that could drain into the most important drinking water source in California.

After all of these considerations and revelations that we have on this subject matter, it is mind-boggling that we would simply take Westlands' word under this agreement. It is equally mind-boggling that we are seriously here today to consider these bills that are not even close to being right.

Mr. Chairman, these bills represent a bad deal for taxpayers, the environment, and public health. They should be rejected by Congress unless and until they are very significantly improved. And with that, I yield the balance of my time.

Dr. FLEMING. And the gentlelady yields.

Our first panel today will include a panel of our colleagues who have direct interest in this legislation. First we will hear testimony from Mr. Valadao of California on his bill, H.R. 4366. We will then hear from Mr. Costa, who is also from California, on H.R. 5217. Then we will hear from Mr. Zinke of Montana, for his statement on the discussion draft of the "Blackfoot Water Rights Settlement Act of 2016."

Each of you will be recognized for up to 5 minutes, and I now recognize Mr. Valadao for 5 minutes.

**STATEMENT OF HON. DAVID G. VALADAO, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. VALADAO. Good morning, Chairman Fleming, Ranking Member Huffman, and members of the committee. I appreciate the invitation to testify before you today on my legislation, H.R. 4366, the San Luis Drainage Resolution Act, which I introduced in the House of Representatives earlier this year.

The district that I represent in California's Central Valley has the most productive agricultural land in the entire world. Producing over 400 different commodities, it is safe to say that my district plays a vital role in feeding the Nation and the world.

Many outside of agriculture do not understand the complex and delicate systems involved in putting food on the table of American families. The San Luis Drainage Resolution Act that we will be hearing today helps ensure the land in Westlands Water District can continue to remain productive, while protecting the environment, and letting the Federal Government off the hook for potentially billions of dollars.

I would like to provide a brief background on the ongoing problem that the settlement contained and which my bill aims to correct.

In 1960, Congress passed the San Luis Act, which authorized the construction and operation of the San Luis as a part of the Central Valley Project (CVP). The principal purpose of the San Luis Unit was to furnish water for irrigation of land in Merced, Fresno, and Kings Counties in California.

Any water project that brings fresh water to an agricultural area must take the water remaining after the crops have been irrigated away from the root zone. Too-shallow groundwater results in salt buildup in soils and reduces the productivity of farmland. For this reason, the San Luis Act expressly conditioned the construction of the San Luis Unit on the provision of drainage facilities.

The courts have held that the Secretary of the Interior was and is responsible for providing the drainage to the San Luis Unit of the CVP. According to the Bureau of Reclamation, this is at the cost to the Federal Government of over \$3.5 billion, indexed for inflation. Following litigation in the 1970s, Interior stopped providing the drainage required for the San Luis Unit. This caused the destruction of thousands of acres of farm land.

After decades of litigation, appeals, and negotiations concerning the Federal Government's obligation to construct an agriculture drainage unit to remove excess water from the western side of the San Joaquin Valley, the U.S. Federal Government and Westland's Water District have reached an agreement to resolve this dispute.

The crux of the agreement is the requirement that Westland's Water District assumes full responsibility for managing drainage within the District. In return, the Federal Government will relieve Westlands Water District of its existing repayment obligation for construction of the Central Valley Project.

While both the Federal Government and Westlands Water District have approved the terms of this agreement, Congress must affirm the recent settlement in order to achieve a final resolution. I cannot stress enough the importance of this legislation so that we may finally end this decades-old dispute. In doing so, we are able to protect the economic stability of the most productive agriculture region in the world by preserving agriculture production and, as a result, safeguarding thousands of desperately needed jobs in the region.

Furthermore, passage of this legislation will shield American taxpayers from potentially billions of dollars in future drainage and litigation costs by relieving the United States of its multi-billion dollar statutory and court-ordered drainage obligation. The U.S. Government has already spent over \$100 million in previous settlements related to the failure to meet this drainage obligation.

In conclusion, this common-sense agreement reached by the Federal Government and Westlands Water District, and backed by both Democrats and Republicans in the House of Representatives, is absolutely imperative. Implementation of the San Luis Unit Drainage Resolution would settle this long-standing dispute, proving beneficial for all those involved.

Thank you for your time, and I yield back.

Dr. FLEMING. Thank you, Mr. Valadao.

Mr. Costa, you are recognized.

**STATEMENT OF HON. JIM COSTA, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. COSTA. Thank you very much, Chairman Fleming, Ranking Member Huffman, and members of the subcommittee. I appreciate the invitation to testify before you today on my legislation, H.R. 5217, the San Luis Drainage Resolution Act, which I introduced to the House of Representatives earlier this year. This bipartisan piece of legislation that is reflected in both my legislation and Congressman Valadao's reflects years of work by this Administration and the Department of the Interior.

I would like unanimous consent to submit a letter from Secretary Mike Connor indicating the resolution that the Administration gave in supporting this bipartisan legislation.

[No response.]

Dr. FLEMING. Without objection, so ordered.

[The information follows:]

THE DEPUTY SECRETARY OF THE INTERIOR,
WASHINGTON, DC

April 21, 2016

The Honorable David Valadao
House of Representatives
Washington, DC 20515

Dear Representative Valadao:

Thank you for your letter dated November 24, 2015, regarding the Drainage Settlement between Westlands Water District (Westlands) and the United States (Settlement). In your letter, you requested confirmation of our mutual understanding of the Settlement in a number of areas. Your interest in the Settlement is appreciated and our responses to the specific areas you raised are below.

Litigation and Legal Claims That Would Be Resolved Under the Settlement

Litigation over the United States' obligation to provide drainage service to the San Luis Unit of the Bureau of Reclamation's (Reclamation) Central Valley Project (CVP) has a long and complicated history spanning the last two and a half decades. The summary in your November 24, 2015, letter accurately describes the litigation that the Settlement resolves. Litigation commenced shortly after the United States halted use of the San Luis interceptor drain and plugged all Federal facilities, following the discovery of embryonic deformities of aquatic birds at Kesterson Reservoir. This Settlement resolves *Westlands Water District v. United States*, the remaining breach of contract case relating to the United States' drainage obligation, as well as provides for the vacatur of the 2000 Order Modifying Partial Judgment in *Firebaugh Canal Water District v. United States*, whereby the district court expressly retained jurisdiction and actively exercises a monitoring function over Reclamation's implementation of drainage service in the San Luis Unit. The Settlement also provides a framework for resolving *Michael Etchegoinberry, et. al. v. United States*, which is a Fifth Amendment takings case brought by individual landowners within Westlands. These cases are described in more detail below.

Firebaugh was filed in 1988 by two water districts located outside and "downslope" of the San Luis Unit. The action was partially consolidated with *Sumner Peck Ranch, Inc. v. United States*, a similar action brought in 1991 by approximately 100 landowners located within the San Luis Unit. In 1995, following a trial, the district court entered a partial judgment that the Secretary of the Interior's (Secretary) obligation under the San Luis Act to provide drainage was not excused or rendered impossible. In 2000, the Ninth Circuit largely affirmed the partial judgment, and on remand the district court entered an injunction (2000 Order Modifying Partial Judgment) against the Secretary requiring Reclamation to "promptly" provide drainage service to the San Luis Unit. In 2002, the United States settled the *Sumner Peck* plaintiffs' claims.

In compliance with the 2000 Order Modifying Partial Judgment, the Department developed a Plan of Action outlining the steps it would follow to implement a drainage solution for the San Luis Unit. Following completion of an environmental impact statement, Reclamation issued a Record of Decision (ROD) in March 2007 to meet the drainage service requirements of the court's injunction. The Department also prepared and submitted to Congress a feasibility report, concluding that the cost of implementing the selected alternative would be approximately \$2.7 billion (now \$3.8 billion in April 2015 dollars). That amount far exceeds the remaining appropriations ceiling authorized for construction of the San Luis Unit. As a result, the alternative selected in the ROD cannot be fully implemented under existing law. As part of the on-going litigation, the Department advised the court in November 2009 that, while it could not implement the entire ROD, sufficient appropriation ceiling remained to allow it to construct one subunit of drainage facilities within Westlands. Beyond that subunit, however, the Department remains unable to continue implementation of the ROD without additional Congressional authorization.

During the same time Reclamation was formulating its plan of action for the implementation of drainage service, the *Firebaugh* plaintiffs continued to seek their own injunction requiring Reclamation to provide drainage service to lands adjacent to the San Luis Unit. On September 30, 2011, the district court held that the San Luis Act imposed no duty on the Secretary to provide drainage service that would protect or remediate conditions on plaintiffs' lands, and the plaintiffs' had failed to demonstrate unreasonable delay by Reclamation in implementing a drainage plan within the San Luis Unit. The district court subsequently entered final judgment on all of the *Firebaugh* plaintiffs' claims and the *Firebaugh* plaintiffs appealed to the Ninth Circuit. On April 3, 2013, the Ninth Circuit affirmed the district court, *Firebaugh Canal Water Dist. v. United States*, 712 F.3d 1296 (9th Cir. 2013); a petition for rehearing *en banc* was subsequently denied and the United States Supreme Court denied cert.

Under the 2000 Order Modifying Partial Judgment, the district court continues to monitor Reclamation's activities to provide drainage service for a subunit of the San Luis Unit within Westlands pursuant to a "Control Schedule." The United States submits biannual reports to the district court, which report on progress in implementing the Control Schedule. The filing of these status reports, supported by a declaration from Reclamation's Mid-Pacific Regional Director presently continues. On October 26, 2015, Judge O'Neill granted a Joint Motion for a Partial Stay by Westlands and the United States and partially stayed implementation of the current Control Schedule through January 15, 2017 while parties continue to work on obtaining legislation required to implement the Settlement, however, the Court did not relieve parties of filing bi-annual status reports with the court.

On September 2, 2011, a group of individual landowners within Westlands filed suit in the Court of Federal Claims alleging that the failure by the United States to provide drainage service to their lands resulted in a physical taking of their property without just compensation in violation of the Fifth Amendment. Plaintiffs brought their suit as a class action on behalf of all landowners located within Westlands "whose farmlands have not received the necessary drainage service the United States is required to provide under the San Luis Act . . ." A plaintiff class has yet to be certified. A motion by the United States seeking dismissal of the takings claim was denied on September 20, 2013. *Etchegoinberry, et. al. v. United States*, 114 Fed. Cl. 437 (2013). The Opinion contains language sharply critical of the United States' delay in providing drainage to Westlands. Westlands itself is not a party to this litigation, but pursuant to the Settlement would intervene for purposes of settling the case. The Court of Federal Claims has stayed this litigation to allow settlement negotiations to proceed, but is requiring the submission of regular status reports on the progress of the discussions.

On January 6, 2012, Westlands filed its own suit against the United States also in the Court of Federal Claims, alleging that the government's failure to provide drainage service to the Westlands' service area constituted a breach of Westlands' 1963 Water Service and 1965 Repayment contracts (including the interim renewal of those contracts). The United States moved to dismiss Westlands' claims. On January 15, 2013, the Court of Federal Claims granted the United States' motion to dismiss, ruling that none of the contracts contained an enforceable promise to provide drainage to Westlands. *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177 (2013). Westlands has appealed to the Federal Circuit, and briefing on the appeal is complete. On December 2, 2015, the Federal Circuit granted a stay through January 20, 2017.

Benefits to the U.S. of the Westlands Settlement:

- The Settlement, if authorized by Congress, would relieve the Department of all drainage obligations imposed by the San Luis Act, including implementation of the 2007 ROD, within Westlands. The 2015 costs of implementing the entire ROD are roughly \$3.8 billion.
- Westlands agrees to seek dismissal of the *Westlands* breach of contract litigation and would join the United States in petitioning for vacatur of the 2000 Order Modifying Partial Judgment in the *Firebaugh* case directing implementation of drainage service and control schedules.
- The Settlement establishes a framework for resolving all individual landowner claims in the *Etchegoinberry* takings case. Specifically, Westlands would intervene in this case for settlement purposes and would provide compensation to its landowners. Potential exposure to Federal taxpayers from an adverse judgment could be as high as \$2 billion.

- Westlands agrees to provide for the release, waiver, and abandonment of all past, present, and future claims, including from individual landowners, and further agrees to indemnify the United States for any and all claims relating to the provision of drainage service or lack thereof within its' service area.
- Westlands has also agreed to permanently retire a total of not less than 100,000 acres of lands within its boundaries utilizing those lands only for the following purposes:
 - a. Management of drain water, including irrigation of reuse areas;
 - b. Renewable energy projects;
 - c. Upland habitat restoration projects; or
 - d. Other uses subject to the consent of the United States.
- The Settlement transfers the legal obligation to manage drainage to lands within the Westlands service area from the United States to Westlands.
- Westlands agrees to cap its CVP water deliveries at 75 percent of its contract quantity. Any water savings above this 75 percent cap would become available to the United States for other CVP authorized purposes.
- As part of the overall Settlement, the United States anticipates it will enter into a water service contract with Lemoore Naval Air Station to provide a guaranteed quantity of CVP water to meet the irrigation needs of the Naval Air Station associated with air operations, and Westlands would agree to wheel all CVP water made available to Lemoore.

The Settlement provides the following benefits to Westlands:

- Westlands will be relieved of current, unpaid capitalized construction costs for the CVP, the net present value of which is currently estimated to be \$295 million. Westlands will still be responsible for operation and maintenance, will pay restoration fund charges pursuant to the Central Valley Project Improvement Act and will be responsible for future CVP construction charges associated with new construction for the project.
- The Secretary will convert Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing key terms and conditions. As a "paid out" project, the benefit of this conversion gives the district a contract with no expiration term, consistent with other paid out Reclamation projects. However, the contract will contain terms and conditions that are nearly identical to those in the current 9(e) contract.
- Westlands will be relieved of Reclamation Reform Act (96 Stat. 1269) provisions relating to acreage limitations and full cost pricing. The Reclamation Reform Act grants this relief on its face to projects that are considered "paid-out." Additionally, the tiered pricing provisions are triggered when a district receives 80 percent of its contract quantity, and as part of the Settlement, Westlands water deliveries will be capped at 75 percent of its contract quantity.
- Westlands will also take title to certain facilities including the portion of the San Luis Drain that lies within Westlands' service area.

The Settlement envisions relief from statutory obligations, debt relief, title transfer, and authority to enter into a new CVP water service contract with Lemoore Naval Air Station, all activities requiring Congressional authorization.

Net Benefit for the San Luis Unit Drainage Resolution Act:

There were several aspects regarding the obligation to provide drainage service that were evaluated in determining the overall net benefit to the United States. Included in this consideration were avoided drainage construction costs, repayment to the United States of reimbursable costs, relief from Reclamation Reform Act fees, and unpaid CVP capital obligations. Specific to Westlands, further consideration was given to the indemnification of current legal claims, namely the *Etchegoinberry v. United States* litigation, of which just financial compensation estimates could be as high as \$2 billion.

The result of the Department's net benefit analysis was a savings to the United States of at least \$968.9 million in regards to Westlands. This amount does not include the avoided financial liability in the *Etchegoinberry* claim. The different aspects of the net benefit analysis are summarized below.

- Avoided Construction Costs to the United States—Based on current conditions and recognition of completed drainage projects valued at roughly \$700 million in 2015 dollars, particularly in the Northerly Area of the San Luis

Unit, the total remaining cost of providing drainage service has been calculated to \$3.1 billion. Approximately \$2.5 billion is associated with the cost to provide drainage service specifically to Westlands while the remaining \$558 million is the total cost that would be needed to address drainage concerns of the Northerly Area of the San Luis Unit.

- Repayment of Reimbursable Drainage Construction Costs—Following the completion of drainage construction projects and implementation of drainage service, Westlands would be responsible for reimbursable costs incurred by the United States. Assuming repayment would occur over a 40 year period with zero interest as required by current applicable law, the calculated repayment value in 2015 dollars is approximately \$1.2 billion for Westlands.
- CVP Capital Obligation Relief—Your November 24, 2015 letter accurately describes the amount of debt that would be repaid to the United States by the year 2030 associated with continued repayment of Westlands' CVP obligations as \$375 million. For purposes of evaluating a potential settlement, however, we believe the value of repayment in today's dollars is a more accurate representation of the costs of settlement. Consequently, we believe \$295 million, which represents the costs of repayment forgiveness in today's dollars, is the figure that should be used when evaluating the settlement.
- San Luis Drain Feature Re-Evaluation (SLDFRE)—Reclamation has undertaken some drainage actions as part of the SLDFRE. The net present value of the debt relief of these construction costs to Westlands is \$13.6 million.
- Grasslands Bypass Project—The estimated operations and maintenance obligations that would be forgiven for the Grasslands Bypass Project for Westlands is \$2.6 million. Historically, these costs were previously designated as capitalized construction costs and were not recovered on an annual basis when the expenditures occurred.
- Reclamation Reform Act Relief—As part of the Settlement, Westlands would receive relief from the Reclamation Reform Act costs associated with water delivered to full cost lands. The estimated amount of this relief is approximately \$20 million.

The costs to implement drainage actions in Westlands in this analysis are based on the costs in the 2007 ROD, indexed to April 2015 dollars. We recognize that Westlands can realize efficiencies, such as using local or in-house labor, reduced travel, and different purchasing requirements than Reclamation, that reduce their cost to implement drainage as compared to the costs if Reclamation were to implement the 2007 ROD. In addition, it is widely recognized that the drainage issue may have lessened over the last few years due to drought and irrigation efficiencies, but we are of the view that long term, there will be a need for substantial financial investment to alleviate drainage concerns in the San Joaquin Valley. While California has experienced a series of dry years recently, the historic hydrologic record indicates that wet cycles will return and drainage will again become a substantial challenge in the San Luis Unit.

In addition, with Westlands responsible for drainage within its boundaries, there is more incentive to increase irrigation efficiencies as new technology is developed in the future, which is a component of managing drainage that is largely outside of Reclamation's control. It should also be noted that Westlands will be responsible for implementing drainage in perpetuity. The costs in this analysis have only been indexed to April 2015 dollars. These costs will rise as drainage actions are implemented many years and potentially, decades into the future.

Based on these and other terms of the Settlement, it is our belief that the Settlement results in significant savings to American taxpayers when compared to the unavoidable costs that would occur without the terms agreed to in the Settlement. Moreover, we are also of the view that failure to settle on-going litigation will place the Department's ability to address the effects of the on-going drought in both the short and long term at risk due to the potential of significant amounts of appropriations being expended on providing drainage service. As a practical matter, should our efforts to settle litigation with Westlands fail, funding for programs throughout the Mid-Pacific Region are likely to be reduced in order for Reclamation to adequately fund the Control Schedule. Please find the attached "Costs and Benefits to the Federal Government" table for Westlands that succinctly capture the information presented in this letter.

We want to again express our appreciation for your attention to this matter. Please contact us if you have any further questions.

Sincerely,

MICHAEL L. CONNOR.

ATTACHMENT

U.S. Bureau of Reclamation's Assessment of Costs and Benefits to Federal Government of Westlands' Drainage Settlement (Presented in Present (2015) Net Worth)

Benefits to Federal Government	Costs to Federal Government
\$1.3 billion saved¹ <i>\$2.5 billion (estimated cost of drainage for Westlands) minus \$1.2 billion (present value of Westlands construction repayment)</i>	\$295 million in 2015 dollars³ <i>(Westlands repayment of CVP capitalized construction obligations of \$375 million, discounted to value in 2015)</i>
\$0 to \$2 billion saved² <i>(Takings claims)</i>	\$13.6 million San Luis Drain Feature Re-Evaluation (SLDFRE)⁴ <i>(Westlands repayment of SLDFRE capitalized construction costs of \$23.6 million, discounted to value in 2015)</i>
	\$2.6 million Grasslands Bypass⁵ <i>(Westlands O&M obligation for Grasslands Bypass)</i>
	Total of \$19.9 million over next 15 years⁶ <i>(Reclamation Reform Act Relief)</i>
Total Savings: \$1.3 to \$3.3 billion	Total Costs: \$331.1 million

¹ Total drainage construction costs (as provided for under the 2007 Record of Decision) indexed to April 2015 are \$3,798,393,390. Northerly Area portion of drainage costs were removed leaving \$2,535,021,682 related to Westlands Water District. Assuming annual spending is straight-lined over a 15 year period, the annual straight-lined expense to implement drainage is compounded to the year 2030 at an inflation rate of 3%, resulting in the annual escalation of costs. An additional \$1,236,868,997 is subtracted to account for the assumed 40 year construction repayment with no interest beginning in 2030 discounted to 2015 dollars at a 3% discount rate.

² Estimated range of damages and pay compensation for takings claims arising out of Etchegoinberry v. U.S. litigation.

³ Present value calculation (using 3% discount rate) for Westlands remaining CVP capitalized construction obligation. Assumed Westlands would continue to repay \$375 million until year 2030 with no interest.

⁴ Present value calculation (using a 3% discount rate) for Westlands repayment obligation for capitalized construction costs associated with San Luis Drain Feature Re-Evaluation, with repayment beginning in 2016. Assumed Westlands would repay \$23.6 million over 40 years.

⁵ Estimated O&M obligation for Westlands (Broadview assignment only) for drainage costs associated with Grasslands Bypass. These costs were previously designated as capitalized construction costs and were not recovered on an annual basis when the expenditures occurred.

⁶ Estimated Reclamation Reform Act (RRA) revenue Reclamation could have received by 2030. Amount varies year to year and is dependent on annual allocation and application of water placed on to full cost lands pursuant to the RRA.

April 20, 2016

Mr. COSTA. It is important to note that this results in a decision made by this Administration after the court made a decision in 2000. As a matter of fact, the language of the Westlands Settlement Agreement has been in since last fall, and committees and staff have been briefed. Member staff have been briefed over

the recent months. This is not something new that they have just looked at.

The district that I represent in Central California's Valley is home to some of the most productive agricultural land in the world. The San Joaquin Valley, which I and Congressman Valadao call our home, and other representatives, are proud of the crops that we produce that ultimately feed the Nation. This is what we are talking about—food.

This settlement agreement is much larger than the issues that we will be discussing here today because it is food on America's dinner table. It is a national security item. Half the Nation's fresh fruits and vegetables come from California. We are number one in the dairy industry, number one in the citrus industry, and number one in nut production. This is food that goes on all of our constituents' dinner tables, period; and that needs to be understood.

The San Luis Drainage Act that we will hear today helps ensure the land in the San Luis Unit of the Central Valley Project has the opportunity to continue the long-standing history of productivity while saving the Federal Government literally \$3.8 billion in liability.

Secretary Connor, I think, said it best, "After the court made the decision in 2000, they had three choices. The three choices were, (1) to change the law, which they chose not to do; (2) was to reach a settlement agreement, which this legislation reflects; or (3) to be found in contempt of court, neither of which Mr. Connor nor Secretary Salazar wanted to do."

As a matter of fact, this legislation strongly parallels the settlement agreement that was reached that the NRDC negotiated as part of the San Joaquin River Settlement Agreement. And yes, you can shake your head, but I would like to enter this as a record to show the parallels of the actions that have taken place on the San Joaquin River Settlement Agreement compared to these agreements that we have here, Mr. Chairman.

[No response.]

Dr. FLEMING. Without objection, so ordered.

Mr. COSTA. Congressman Valadao laid out the case for the necessity for the drainage settlement for Westlands Water District in his testimony. I have similar thoughts as it relates to the settlement agreement that I am carrying. My legislation authorizes an agreement between three Northerly Water Districts and the San Luis Unit, commonly known as the Northern Districts. That is Panoche, Pacheco, and the San Luis Unit.

The passage of H.R. 5217 would result in a resolution to all of the drainage obligations for the United States, and would move the responsibilities of those drainage obligations—and that is where the nexus is, that is where the checks and balances are—to the control of the local jurisdictions. And guess what? If they don't abide by those, they don't get the water. That is the bottom line.

These agreements reached by the Obama administration and the water districts within the San Luis Unit need to be authorized to move forward. That is what this hearing is all about. The benefits of the United States are significant. There is no lessening of environmental protections requirements under state or Federal law by these agreements. That needs to be underlined, as well.

But let me just close on this note. Some of my colleagues here and elsewhere have said, “Look, if Westlands Water District is for something, we are against it, automatically, period.” This has been a political football that has been out in California for years. As a matter of fact, some have suggested that the San Luis and farming on the west side ought to dry up and blow away. Dry up and blow away, because that is how much they think of the production of food and fiber.

Yes, and let me tell you something. That 100,000 acres that you are concerned about that may be sold? Let me explain something to you. If that 100,000 acres doesn’t have water, which it doesn’t; and if it doesn’t have drainage, which it doesn’t—listen to me, if it doesn’t have water and it doesn’t have drainage, guess what? It has no value, period.

So, let me close with this thought. Doing nothing, which is something we do very well around here, only heightens the concern of your issues about drainage in the Delta. That is what we do well around here is nothing. So advocate doing nothing, and we will continue to deal with the challenges, the Federal Government will continue to be exposed to \$3.5 billion of liability as a result of the court decision.

Thank you very much, Mr. Chairman, for the time. I will look forward to the hearing testimony.

Dr. FLEMING. I thank the gentleman.

Mr. Zinke is now recognized for 5 minutes.

**STATEMENT OF HON. RYAN K. ZINKE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MONTANA**

Mr. ZINKE. I am both excited and proud to welcome Chairman Harry Barnes of the great Blackfeet Nation of Montana to Washington, DC. Mr. Barnes was elected Chairman of the Blackfeet Tribal Business Council on July 10, 2014, and has worked diligently over the past few years to rebuild and bolster the tribe’s government and community.

Mr. Chairman, I know you have waited a long time for this day to come, and I am glad we have finally passed this one major hurdle. It is a historic day for Montana. Today marks the first time in the Blackfeet Compact history that has received a hearing on the House side. Shortly after the hearing, I will be proud to formally introduce the bill to the House itself. This accomplishment has been made possible because of the hard work of many people. The collaborative efforts of both sides of the aisle between the tribe, the state, and the congressional delegation clearly show what a priority this is to the state of Montana.

We all jointly support this compact and will continue to fight to see its passage through Congress. The compact has also reached significant milestones within the Administration. The letter provided to this committee is the first of its kind, and I am glad to help push the efforts between the OMB, Department of the Interior, and the Department of Justice forward. I cannot stress how critical this water compact is to the state of Montana, the tribe, and America, which is why it is so widely supported across the state.

This is not a contentious issue. Not only is it critical to address the tribe's water issues, but many in our state also rely on these projects and the completion of this water compact settlement. The Blackfeet Nation are warriors. They have fought for over 100 years to protect their culture and their traditions. And water is a critical part of their way of life, which is why this compact is so important. Whether it is for economic purposes or religious ceremonies, water is, as Chairman Barnes so eloquently states, the creation of the Blackfeet people.

I appreciate the opportunity to be here today and speak about the importance of this compact, and thank the committee for holding a hearing on this issue.

On a personal note, I grew up over the mountains of the great Blackfeet Nation. I have a map in my office. The map shows what the state looked like in 1889, when the great state of Montana became a state. And I can tell you the Blackfeet Nation has given a lot to this country. They have given this country a lot of reservation land. They have fought in every battle this Nation has ever fought. My respect to the tribe is undaunted. I ask you for support, and I look forward to your questions. I yield back.

Dr. FLEMING. I thank the gentleman. We have no formal question round, but certainly gentlemen and other Members who have testified are welcome to join us on the dais.

We are now ready for our second panel. If you will go ahead and come forward, second panel.

Let's see, we need to put new signs out. If you would, it would help me out if you sit behind the sign that identifies you so I don't make too many mistakes.

[Laughter.]

Dr. FLEMING. First of all, we have the Chairman of the Blackfeet Nation, the Honorable Harry Barnes, who is based out of Browning, Montana. Chairman Barnes will testify on the discussion draft of the Blackfeet Water Rights Settlement Act of 2016.

Next is Mr. John C. Bezdek, Counselor to the Deputy Secretary at the Department of the Interior in Washington, DC. He will be testifying on all three bills today.

Seated behind Mr. Bezdek, as accompanying witnesses, will be Ms. Letty Belin, a Senior Counselor to the Deputy Interior Secretary, and Mr. Craig Alexander, Chief of the Indian Resources Section, Environment and Natural Resources Division at the Department of Justice.

Next is Mr. Steve Ellis, Vice President of the Taxpayers for Common Sense located in Washington, DC. Mr. Ellis will be testifying on H.R. 4366 and H.R. 5217.

Next is Mr. Jerry Brown, General Manager of the Contra Costa Water District, which is based out of Concord, California. I guess there will be two Jerry Browns in California, as a result. Mr. Brown will be testifying on both H.R. 4366 and H.R. 5217.

And then, finally, Mr. Thomas Birmingham, General Manager for the Westlands Water District, which is based out of Fresno, California. Mr. Birmingham will testify on H.R. 4366 and H.R. 5217.

Each witness' written testimony will appear in full in the hearing record. I ask that you keep your oral statements to 5 minutes only.

The way the lights work is you will be under a green light for the first 4 minutes. Then you will be under a yellow light, caution light, for the last minute. If it turns red before you complete your testimony, please quickly come to an end so that we can move on and keep the hearing going and get everyone's input and questions asked.

I now recognize Mr. Zinke for introduction of our first witness.

Mr. ZINKE. Thank you, Mr. Chairman.

Let me introduce Chairman Barnes. The Chairman is now the Chairman of the Blackfeet Nation. He was elected, as earlier remarked, a former veteran.

With that, Mr. Chairman, I will have you say your opening remarks. I yield back.

Dr. FLEMING. Chairman Barnes, you are now recognized for 5 minutes.

**STATEMENT OF HON. HARRY BARNES, CHAIRMAN,
BLACKFEET NATION, BROWNING, MONTANA**

Mr. BARNES. Thank you very much, Chairman Fleming, Ranking Member Huffman, and members of the committee. My name is, in fact, Harry Barnes, and I serve as Chairman of the Blackfeet Tribal Business Council of the Blackfeet Indian Nation of Montana. I am honored to be here on behalf of the Blackfeet Nation in support of the Blackfeet Water Rights Settlement Act. I want to thank the committee for holding this hearing on this bill that is critical to the future of the Blackfeet people. I also want to thank Congressman Zinke and his staff for their leadership and strong support of this legislation and settlement.

The Blackfeet Water Rights Settlement is the culmination of over two decades of work by the tribe. It represents a historical breakthrough in the tribe's over century-long battle to secure and protect its water rights. Iterations of the bill have been introduced in previous Congresses. In 2015, Senators Tester and Daines introduced the Blackfeet Water Rights Settlement Act, Senate Bill 1125. Earlier this year, the Senate Indian Affairs Committee marked up and favorably reported the bill out of committee.

The discussion draft being heard today, which is substantially similar to the marked-up version of Senate Bill 1125, ratifies the Blackfeet Montana Water Rights Compact; resolves significant water-related claims against the Federal Government; and, most importantly, provides the critical resources needed for the development of the self-sustaining economy on the Blackfeet Reservation, and a permanent homeland for the Blackfeet people.

The Blackfeet Tribe resides on the Blackfeet Indian Reservation in North Central Montana. The reservation is located along the Eastern Rocky Mountains and borders the Glacier National Park, Lewis and Clark National Forest, and the U.S.-Canadian border.

The reservation was established by treaty with the United States in 1855. The present reservation is approximately 1.5 million acres, and there are currently over 17,000 enrolled members, about half of whom reside on the reservation.

Six different drainages are encompassed within the Blackfeet Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek, and Birch Creek. The reservation is

located at the headwaters of these streams, two of which—the St. Mary River and the Milk River—are allocated between the United States and Canada by the 1909 Boundary Waters Treaty. As a result, any tribal claim against the system creates a great deal of uncertainty among Montana water users.

In December 2007, after nearly two decades of negotiation to resolve the Blackfeet Tribe's water rights, the tribe completed a water rights compact with the Montana Reserved Water Rights Compact Commission. The compact was overwhelmingly approved by the Montana legislature in April 2009.

In general, the compact confirms the tribe's water rights to all streams on the reservation. It brings certainty to the tribe's water rights and protects the tribe's use of water for the tribe's growing population.

The Blackfeet Water Rights Settlement Act would, (1) ratify the tribe's water compact with the state of Montana; (2) resolve the Blackfeet Tribe's water-related claims against the United States; and (3) provide the necessary resources needed for the tribe to put its water to use and to develop a self-sustaining economy on the Blackfeet Reservation.

In consideration for the tribe waiving its claims against the United States, the legislation authorizes Federal funding for vital drinking water projects, water storage projects, and irrigation improvements and development on the reservation. It also provides for water-related economic development projects, and provides funds to address environmental and fishery issues. It is important to note that the tribe has water-related claims, as described in more detail in my written statement, against the Federal Government in excess of the funds authorized in the legislation.

The settlement also includes funding for unfunded Federal programmatic responsibilities, including deferred maintenance and rehabilitation on the BIA's Blackfeet irrigation project. Although these are obligations that the Federal Government was required to undertake outside the context of this settlement, the tribe has agreed to these items being included as consideration for the settlement.

Notably, with respect to cost, since 2012, the tribe has agreed to reduce the amount of funding authorized in the legislation by more than \$190 million to address concerns raised by the Department of the Interior. Moreover, the state is contributing \$49 million toward the Blackfeet Settlement, the largest contribution the state has made to any Montana water settlement.

Dr. FLEMING. I am sorry, Mr. Chairman, you are 38 seconds past your deadline. Again, I promise you, every word of it will be in the official record.

Mr. BARNES. I appreciate that, Chairman.

Dr. FLEMING. Yes, sir.

Mr. BARNES. I apologize for the oversight.

[The prepared statement of Mr. Barnes follows:]

PREPARED STATEMENT OF CHAIRMAN HARRY BARNES, BLACKFEET NATION
ON DISCUSSION DRAFT OF H.R. _____,
“BLACKFEET WATER RIGHTS SETTLEMENT ACT OF 2016”

Chairman John Fleming, Ranking Member Jared Huffman, and members of the committee, my name is Harry Barnes, and I serve as Chairman of the Blackfeet Tribal Business Council of the Blackfeet Indian Nation of Montana. I am honored to be here on behalf of the Blackfeet Nation in support of the Blackfeet Water Rights Settlement Act. I want to thank the committee for holding this hearing on this bill that is critical to the future of the Blackfeet People. I also want to thank Congressman Zinke and his staff for their leadership and strong support of this legislation and the settlement.

The Blackfeet Water Rights Settlement is the culmination of over two decades of work by the Tribe. It represents a historical breakthrough in the Tribe's over century long battle to secure and protect its water rights. Settlement legislation ratifies the Blackfeet-Montana Water Rights Compact, resolves significant water related claims against the Federal Government, and most importantly provides the critical resources needed for the development of a self-sustaining economy on the Blackfeet Reservation and a permanent homeland for the Blackfeet People.

THE BLACKFEET RESERVATION AND THE BLACKFEET PEOPLE

The Blackfeet Reservation was established by treaty in 1855. The Reservation is located along the Rocky Mountains in north central Montana, adjacent to Glacier National Park, Lewis and Clark National Forest and the border with Canada. Our Reservation is renowned for its spectacular mountains, majestic plains and abundant natural resources. The Blackfeet People have occupied this area since time immemorial. As we say: “We know who we are and where we come from. We come from right here. We know, and have always said, that we have forever lived next to the Rocky Mountains.”

Our treaty, known as Lame Bull's Treaty, was signed in 1855. Executive Orders and statutes followed, each taking large areas of our traditional land. We ended up with the land that was most sacred to us: our present day reservation. In 1896, the Northern Rockies were taken from us because speculators believed there were rich minerals to be had. When mineral riches did not materialize, this most sacred part of our homeland became part of Lewis and Clark National Forest and a portion later became part of Glacier National Park in 1910. To this day, we question the legitimacy of the 1896 transaction. While the Tribe retained hunting, fishing and timbering rights in the area taken, we hope that one day our claims to this area will be resolved.

The present Blackfeet Reservation is about 1.5 million acres. Although the United States had promised our Reservation would never be allotted in the 1896 Agreement by which the Northern Rockies were lost, the Federal Government went back on its word and allotted lands within the Reservation to individual tribal members under Allotment Acts in 1907 and 1919.

The Tribe now has over 17,000 members, about half of whom live on the Reservation. Our people have worked hard to survive in the sometimes harsh climate of the Rocky Mountains, and to live in the modern world while maintaining the cultural and spiritual ties to the land and its resources.

THE CRITICAL IMPORTANCE OF WATER

Water is critical to the Blackfeet People. It is central to our culture and our traditions. It is an essential element of our way of life, and is crucial to our continuing survival culturally, traditionally and economically. Six different drainages are encompassed within the Reservation: the St. Mary, the Milk, Cut Bank Creek, Two Medicine River, Badger Creek and Birch Creek. These are the veins and arteries of the Reservation and provide life to the Blackfeet People and bind us together as a People. Water is the source of creation to the Blackfeet People. We believe that rivers and lakes hold special power through habitation of Underwater People called the Suyitapis. The Suyitapis are the power source for medicine bundles, painted lodge covers, and other sacred items. Contact with supernatural powers from the sky, water and land is made through visions and dreams and manifests itself in animals or particular objects. The beaver ceremony is one of the oldest and most important religious ceremonies, and beaver bundles have particular significance. The ceremonial importance of water is especially present in the use of sweat lodges as a place to pray, make offerings, cleanse and heal. The sweat lodge remains a part of the religious and spiritual lives of many tribal members.

Water is truly the lifeblood that sustains the Blackfeet People and our way of life. The water resources of the Blackfeet Reservation are essential to make the Reservation a productive and sustainable homeland for the Blackfeet People and for our communities to thrive and prosper. Safe and clean drinking water supplies are vital for the growing population on the Reservation, and water is critical to our economy which is heavily dependent on stock raising and agriculture. The Blackfeet Reservation's location along the eastern Rocky Mountain Front makes it the home of abundant fish and wildlife, which depend directly on the water resources of the Reservation to support them and allow them to thrive. Large game animals, including moose, elk, and deer abound. The Reservation provides significant habitat for grizzly bears and other bears, and for other animals such as lynx, pine marten, fisher, mink, wolverine, weasel, beaver, otter, grey wolf, swift fox and others. Numerous bird species are also found on the Reservation including bald eagle, golden eagle, osprey, ferruginous hawk, northern goshawk, harlequin duck, piping plover, whooping crane, and all migratory and shoreline birds, as well as game birds such as the sharptail grouse, ringnecked pheasant, mountain dove, Hungarian partridge and two other species of grouse. The fishery on the Reservation is renowned, and includes the west slope cutthroat trout, northern pike, lake trout, rainbow trout, mountain white fish, lake white fish, brook trout, brown trout, Yellowstone cutthroat trout, walleye, and many others. The threatened bull trout is also found on the Reservation. The habitats of these wildlife and fish species depend directly on the water resources of the Reservation to support them and allow them to thrive.

The Reservation also possesses significant timber, oil and gas resources and other natural resources. Oil and gas production has occurred on the Reservation since the 1930s, and the Tribe has recently experienced a significantly increased interest in new development on the Reservation. The Tribe has also been working hard to develop wind energy and the hydroelectric potential on the Reservation. All of these activities are dependent on adequate supplies of water.

Fortunately, we are blessed with an abundant supply of water. Over 518 miles of stream and 180 water bodies, including 8 large lakes, are located on the Reservation. More than 1.5 million acre-feet of water arise on, or flow through, the Blackfeet Reservation on an annual basis—the St. Mary River alone contributing over one-third of the total supply. Despite the significant water supply, or maybe because of it, historically, others have sought to appropriate it for themselves, and water has become a precious resource in more modern times.

HISTORICAL WATER CONFLICTS

In 1909, just a year after the historic *Winters* decision involving the Milk River, the United States entered into the Boundary Water Treaty with Canada, which, among other things, divided the Milk River and St. Mary River between the two countries. However, not a word in the Treaty, or the negotiations leading to it, mention the Blackfeet, that these streams arise on or near the Blackfeet Reservation, or that the Blackfeet have rights to water in these streams. Not long after the Boundary Waters Treaty, the United States withdrew significant lands on the Blackfeet Reservation under the 1902 Reclamation Act, and began construction of the St. Mary facilities to divert most of the United States' share of the St. Mary River off the Reservation for use by the Bureau of Reclamation Milk River Project over a hundred miles away. The United States pursued this course notwithstanding that there was an equally feasible project on the Blackfeet Reservation where the water could have been brought. The diversion is accomplished through facilities on the Reservation, including Sherburne Dam, and a 29 mile canal through the Reservation that eventually empties into the Milk River. The Milk River flows north into Canada and then back into the United States near Havre, Montana, where it is heavily utilized by the Milk River Project and by the Fort Belknap Reservation.

There are few historical acts, other than loss of land, that have engendered more passion and outrage than this wholesale transfer of Reservation water to serve non-Indians far downstream, without a word about, or any consideration of, the Blackfeet Tribe's water rights or the Blackfeet water needs. The Tribe is left not only with no access to and no benefit from its own water, but a tangled web of confusing and non-existent rights of way and easements for the St. Mary Diversion facilities on the Reservation. Plans to rehabilitate the 100-year-old St. Mary Diversion facilities so that the diversion of water off the Reservation can continue and perhaps increase, have further raised water right concerns, and have emphasized the need for a final resolution of the Tribe's water rights.

At the same time that the St. Mary diversion was taking place, non-Indian water users south of the Reservation built a dam on Birch Creek, the southern boundary of the Reservation, which was intended to appropriate Birch Creek water for use

by the non-Indian water users off the Reservation. In *Conrad Investment Company v. United States*, decided by the Ninth Circuit in 1908, the same year as the *Winters* case, the court upheld the Tribe's prior and paramount right to the water. But the court did not award the full amount of water necessary to irrigate all of the Tribe's irrigable lands, leaving it open for the Tribe to claim additional water in the future. *United States v. Conrad Investment Company*, 156 Fed. 123 (D. Mont. 1907), *aff'd Conrad Investment Co. v. United States*, 161 Fed. 829 (9th Cir. 1908). In the meantime, Birch Creek has been fully appropriated through non-Indian development of 80,000 acres of irrigation immediately off and adjacent to the Reservation.

Allotment brought the third serious conflict between the Tribe and non-Indian water users. In an attempt to control the water through the land, the *Conrad Investment* case served as the springboard to the first Blackfeet Allotment Act in 1907. Over a span of two Congresses, the Blackfeet Allotment Act moved forward with various water rights provisions intended to make Blackfeet water rights subject to state law, to enjoin the United States from prosecuting any further suits against water users, and to give preference to settlers on surplus lands to appropriate water on the Reservation. See, John Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s–1930s* (University of Oklahoma Press, 2000), Chapter 6. These efforts largely failed, thanks in part to a veto from President Theodore Roosevelt, but the 1907 Allotment nevertheless became law notwithstanding the promise that the Reservation would never be allotted. See Agreement of September 26, 1895, ratified June 10, 1896, 29 Stat. 321, 353, Art. V. With allotment, many of the prime irrigation lands on the Reservation quickly went out of trust, and the Tribe's water rights have gone unprotected from the use of water by non-Indian development on the former allotments. Numerous disputes have arisen over the years of varying severity, and the need to resolve the Tribe's water rights has increasingly become critical.

The 1907 Allotment Act also authorized the Blackfeet Irrigation Project. However, from the outset, the BIA built the Blackfeet Irrigation Project with undersized and inadequate delivery systems and storage facilities, thereby ensuring that the economic promise of the Project would be unfulfilled for the Tribe and tribal members. Project lands continue to have problems in receiving a full supply of water because of the early BIA decisions to undersize the project. Traditionally, the Tribe has taken the approach of sharing the resource cooperatively, but increased shortages during the late irrigation season, and the dilapidated condition of the Blackfeet Irrigation Project, have become serious impediments to water use within the Reservation.

Finally, the cession of western reservation lands in 1895 has historically been a disputed issue to the Blackfeet People. While the Tribe reserved the right to hunt, fish and cut timber on the ceded lands which now form a portion of Lewis and Clark National Forest and Glacier National Park, the area has traditionally held particular significance for religious and cultural reasons. The water rights associated with these activities are resolved in the settlement.

WATER RIGHTS COMPACT

Given the historical water rights issues on the Reservation, the Blackfeet Water Rights Compact is truly a milestone achievement after nearly two decades of negotiations among the Tribe, the Montana Reserved Water Rights Compact Commission and the Federal Government. The Compact was completed in December 2007. The Montana Legislature approved it in April 2009 (85–20–1501 MCA), and it is now before Congress for ratification in the Blackfeet Water Rights Settlement Act. It will further require approval of the Tribe through a vote of the tribal membership.

In general, the Compact confirms the Tribe's water rights to all streams on the Reservation. It brings certainty to the Tribe's water rights and protects the Tribe's use of the water for the Tribe's growing population and need to make the Reservation a productive and sustainable homeland. The Compact:

- Establishes the Tribe's water right as all surface and groundwater less the amount necessary to fulfill state water rights in all drainages except for the St. Mary River and Birch Creek;
- Establishes a St. Mary water right of 50,000 acre-feet;
- Establishes a Birch Creek water right of 100 cfs, plus 25 cfs for in stream flow during the summer and 15 cfs during the winter;
- Protects state water right non-irrigation use and some irrigation uses through "no-call" provisions;
- Provides for water leasing off the Reservation;
- Closes on-reservation streams to new water appropriations under state law;

- Provides for tribal administration of the tribal water and state administration of state law water rights and creates a Compact Board to resolve disputes between tribal and state water rights;
- Provides for an allocation of water stored in Tiber Reservoir; and
- Mitigates the impacts of the Tribe's water rights on Birch Creek water users through a separate Birch Creek Agreement by which the Tribe defers new development on Birch Creek for 15 years over and above the current Conrad Investment decree, and provides 15,000 acre-feet of water per year to Birch Creek water users from Four Horns Reservoir, the total agreement not to exceed 25 years.

STATE APPROVAL AND STATE CONTRIBUTION

As part of the state approval of the Compact, the state committed to contribute \$20 million to the Compact. These funds were fully authorized and are available when the Compact becomes final. In 2007, the Montana Legislature also appropriated \$15 million for Birch Creek mitigation. Of these funds, \$14.5 million has been placed in an escrow fund for the Tribe as part of the Birch Creek Agreement, and \$500,000 was used for engineering studies for the Four Horns enlargement. In the recent 2013 Legislature, the state also committed an additional \$14 million to the Blackfeet Settlement, bringing the total state contribution to \$49 million. This is a very major contribution on the part of the state, and the largest for an Indian water rights settlement in Montana.

BLACKFEET WATER RIGHTS SETTLEMENT ACT

The Blackfeet Water Rights Settlement Act will: (1) ratify the Tribe's water compact with the state of Montana; (2) resolve the Blackfeet Tribe's water-related claims against the United States; and (3) provide the necessary resources needed for the Tribe to put its water to use and to develop a self-sustaining economy on the Blackfeet Reservation.

Specifically, the bill:

- Ratifies the Compact and authorizes the Secretary to sign it;
- Requires the Secretary to enter into contracts with the Tribe for the delivery of (1) 5,000 acre-feet per year of St. Mary River water through the Milk River Project facilities to the Tribe and (2) provides for additional contracts depending on available water;
- Compensates the Tribe for delay in providing additional St. Mary River water;
- Expressly provides for the Milk River Project purposes;
- Requires the Secretary to implement the Swift Current Bank Stabilization Project to correct environmental problems associated with Milk River Project facilities;
- Provides the Tribe with the exclusive right to develop and market hydro-electric power from the St. Mary Storage Unit of the Milk River Project;
- Directs the Secretary to allocate to the Tribe 45,000 acre-feet per year of water stored in Lake Elwell and authorizes the Tribe to enter into leases or other agreements for the use of that water for any beneficial purpose subject to certain conditions;
- Requires the Secretary, acting through the Commissioner of Reclamation, to:
 - carry out deferred maintenance on the Blackfeet Irrigation Project;
 - undertake rehabilitation and improvements on Four Horns Dam, including dam safety improvements and other improvements for the benefit of the Blackfeet Irrigation Project and in order to provide Four Horns Reservoir water to state water rights users on Birch Creek;
 - plan, design, and construct the Municipal Rural and Industrial water system (involving water intake, treatment, pumping, storage, and pipeline facilities); and
 - construct the Blackfeet Water, Storage, and Development Projects, including new irrigation and storage, on-farm improvements and other water related projects.
- Authorizes Federal funding for the water-related projects authorized in the legislation;

- Confirms the Tribe's instream water rights in the Lewis and Clark National Forest and Glacier National Park;
- Requires the Blackfeet Tribe to work with the Fort Belknap Indian Community on resolving any conflict between their respective Milk River water rights, and directs the Secretary of the Interior to resolve such conflict if the Tribe and Community are unable to do so provided certain conditions are met;
- Provides for the waiver and release by the Tribe of water rights claims against Montana and the United States in return for recognition of the tribal water rights and other benefits provided under the Compact and this Act.

WAIVERS/FUNDING

The Tribe has water-related claims against the Federal Government in excess of the funds authorized in the legislation for, among other things: (1) the diversion of St. Mary water off the Blackfeet Reservation to the Milk River Project for approximately 100 years; (2) the environmental and resource damage caused by the St. Mary diversion facilities; (3) claims relating to the 1909 Boundary Waters Treaty; (4) the United States' unfulfilled promise to construct a new storage facility on Two Medicine River after a catastrophic flood in the 1960s; and (5) the failure of the United States to protect the Tribe's water rights from development by others, particularly on Birch Creek, Cut Bank Creek and the Milk River.

In consideration for the Tribe waiving its claims against the United States, the legislation authorizes Federal funding for vital drinking water projects, water storage projects, and irrigation improvements and development on the Reservation. It also provides for water related economic development projects and provides funds to address environmental and fishery issues. The settlement also includes funding for unfunded Federal programmatic responsibilities, including deferred maintenance and rehabilitation on the BIA's Blackfeet Irrigation Project. Although these are obligations that the Federal Government was required to undertake outside the context of this settlement, the Tribe has agreed to these items being included as consideration for the settlement.

Importantly, since 2012, the Tribe has agreed to reduce the amount of the funding authorized in the legislation by more than \$190 million to address concerns raised by the Department of the Interior. Moreover, the state is contributing \$49 million toward the Blackfeet Settlement, the largest contribution the state has made to any Montana water settlement to date.

CRITICAL TRIBAL NEED FOR WATER SUPPLY INFRASTRUCTURE

The water projects authorized in the legislation include a regional water system to provide a long-term municipal water supply to all Reservation communities, funding for the United States' deferred maintenance obligations and safety of dams obligations associated with the Bureau of Indian Affairs' Blackfeet Irrigation Project, putting new lands outside the Project into production through new irrigation facilities and small water storage projects, stock water and domestic water developments, lake and fishery improvements and enhancements, and energy development projects. Settlement funds would also fund the implementation of the Compact and the administration of the tribal water right through the Tribal Water Code.

In particular, it is critical to establish a long-term supply of water to Reservation communities. The Tribe has continually had to address community water supply problems by cobbling together short-term fixes. At the same time, the Reservation population has significantly increased, and projections are that such increases will continue. A long-term supply will provide the necessary stability that will allow for long-term community growth.

At the time the Reservation was established, it was acknowledged that "[t]here is an abundant supply of water arising on or near the Blackfeet Reservation," but much of that water is now diverted off the Reservation. Along with the lack of storage capacity for on-Reservation use and a dilapidated BIA irrigation project, numerous barriers are created for the Tribe in its efforts to protect and put to use its valuable water resources. These challenges in part account for the high unemployment and devastating poverty rate that has plagued the Reservation for generations. Unemployment runs as high as 70 percent and more than half of the employed are below the poverty level. Securing control of and actively managing Reservation water resources would be an important step toward improving economic conditions on the Reservation and creating the homeland envisioned in the numerous treaties and agreements that serve as the foundation of the United States and Blackfeet Tribe's relationship.

LITIGATION WILL CONTINUE IF SETTLEMENT LEGISLATION DOES NOT BECOME LAW

In 1979, the United States filed suit in Federal court seeking to quantify the Blackfeet Tribe's water rights. In 1983, the Federal district court litigation was stayed pending the outcome of the Montana State court water adjudication proceedings. The adjudication of the Blackfeet tribal water rights in the state court proceedings have been stayed pending finalization of the Compact and the Blackfeet Settlement legislation. Should the negotiated settlement of the Blackfeet Tribe's water right claims fail to be ratified by Congress, then the claims of the Blackfeet Tribe will be litigated before the Montana Water Court. The Montana Water Court has already put the Tribe on notice that is not willing to delay litigation of the Tribe's water rights if a settlement is not completed by the end of January 2017. Moreover, if the settlement fails, the Tribe will pursue its monetary claims described above against the United States, resulting in years of litigation and potentially a judgment against the United States that exceeds the funding authorized in the legislation.

CONCLUSION

The Blackfeet Water Rights Settlement has critical importance to the future of the Blackfeet People and represents decades of hard work by many people. The legislation will secure the water rights of the Tribe through ratification of the Tribe's water rights compact, and will also provide the necessary funding for the Tribe to develop its water rights for the benefit of the Tribe and its members. The settlement will significantly contribute to the development of a strong Reservation economy, jobs for tribal members, and a better life for the Blackfeet People.

Finally, although the Department of the Interior was involved in our negotiations every step of the way in the decades long process, and was intimately involved in the drafting of the Compact, the Administration raised a number of issues relating to settlement legislation. The Tribe has worked with the Interior over the last 3 years to come to agreement on the legislation. We are happy to report that the Tribe and Interior are in full agreement on the terms of the legislation.

We thank the committee and committee staff and look forward to responding to any questions you may have.

Dr. FLEMING. Thank you. Next, Mr. Bezdek, you are recognized for 5 minutes.

STATEMENT OF JOHN BEZDEK, COUNSELOR TO THE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. BEZDEK. Chairman Fleming, Ranking Member Huffman, and members of the subcommittee, thank you for the opportunity to appear here today regarding the settlement bills before the subcommittee.

I am accompanied today by Letty Belin, my colleague in the Deputy Secretary's office, who is also the Chair of the Secretary's Working Group on Indian Water Rights. Also with me today is Mr. Craig Alexander of the Department of Justice, who is appearing as a technical witness to help me respond to questions the committee might have on the Blackfeet Water Rights Settlement.

As you know, the Department has submitted detailed written testimony on congressional correspondence regarding H.R. 4366 and the Blackfeet legislation. I will briefly summarize my written testimony in the interest of time.

In terms of H.R. 4366 and H.R. 5217, the drainage bills before the subcommittee today will help resolve over 25-plus years of litigation associated with the Central Valley Project's San Luis Unit. The unit's congressionally authorized features include a drain to remove sub-surface water after irrigation in this part of the

Central Valley. For reasons described in my testimony, the drain was never completed.

The settlement resolves three separate cases currently in litigation. It provides for the vacatur of the 2000 Order Modifying a Partial Judgment in the *Firebaugh Canal Water District v. United States* case. This will allow the United States to avoid the cost of implementing a court-ordered drainage solution currently estimated to be \$3.8 billion. By doing so, it will free up significant resources to address other pressing water needs in California, which are severely needed during this drought, and place the obligation of providing drainage with the District, who is in a much better position than Reclamation to determine the most appropriate and cost-effective manner of meeting these legal requirements.

It also addresses and provides a path forward for resolution of two additional pieces of litigation: a breach of contract claim by Westlands, and a Fifth Amendment takings case filed by individual landowners within Westlands. In the takings case alone, the exposure to the American taxpayer could be in excess of \$2 billion.

We understand there are differing views in this matter, but the settlement before us today reflects the reality that this Department has operated in: exposure to ongoing litigation; meeting court-ordered requirements; and trying to protect existing budget priorities.

Quite simply, in the months and years leading up to today, the potential substantial financial impact of compliance with the judgment has come to pose serious challenges for meeting priority programs in California and throughout the West. The need for action by Congress, new legal challenges, and financial concerns all played a significant role in the Department's decision to enter into settlement negotiations with Westlands, and ultimately to the terms of the settlement itself. For these reasons, the Department supports H.R. 4366.

With regard to the Blackfeet Water Rights Settlement Act, I would like to congratulate Chairman Barnes, the Blackfeet Tribe, and the state of Montana for their hard work on this settlement. This took decades to achieve, and required significant compromise by all of the parties. This is an incredible achievement, and it is a testament to the perseverance and vision of Blackfeet leaders who have waited over 100 years for this moment to arrive.

Disputes over Indian water rights are expensive, divisive, and create financial, economic, and societal barriers. Settlements to these disputes, however, help break down these barriers and improve water resources management by encouraging collaboration among neighboring communities, while also stabilizing their economies. This model has proven time and time again throughout the West, and it is why the United States has pursued a policy of settling Indian water rights claims for over 30 years.

For the Blackfeet Tribe, this settlement is a crucial and long-awaited step toward self-determination. It will provide badly needed tools for achieving a viable homeland, while overcoming high unemployment, extreme poverty, and a lack of employment opportunities.

The Blackfeet water rights settlement resolves all outstanding Blackfeet water claims, quantifies a tribal right to more than 750,000 acre-feet of surface water and nearly all groundwater on the reservation, and funds the construction and rehabilitation of water-related infrastructure on the reservation for the benefit of the tribal community.

Federal settlement funding will provide lasting benefit for the tribe and its members by protecting public health and creating substantial numbers of temporary and permanent employment opportunities on the reservation, including construction, water management, renewable energy, agriculture, recreation, and tourism. The settlement will also remove the cloud of uncertainty hanging over the water rights for the Milk River project. Moreover, the settlement provides protections to state-based water users and the regional economy, which rely on such use.

While we believe that each settlement should be evaluated on its own merits and that the full range of benefits in any settlement is not easily quantified, the cost of this settlement, when compared to the Federal benefits received, reflect a settlement that is in the best interest of the tribe, the state, and the American taxpayer.

As expressed in our recent correspondence to this committee, this settlement makes good business sense, good economic sense, and good legal sense. In short, this settlement is good government, and we support it. Thank you.

[The prepared statement of Mr. Bezdek follows:]

PREPARED STATEMENT OF JOHN BEZDEK, COUNSELOR TO THE DEPUTY SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR

STATEMENT ON H.R. 4366 AND H.R. 5217, SAN LUIS UNIT DRAINAGE
RESOLUTION ACTS

Chairman Fleming, Ranking Member Huffman, I am John Bezdek, Counselor to the Deputy Secretary at the Department of the Interior. I am pleased to provide the views of the Department of the Interior (Department) on H.R. 4366, the San Luis Unit Drainage Resolution Act. The Department supports the goal of providing a long term drainage solution in the San Luis Unit. The Department notes that H.R. 4366 would authorize the implementation of a settlement of litigation with the Westlands Water District (Westlands) and provide a long term drainage solution and therefore supports the bill. The Department is also aware of the subcommittee's interest in H.R. 5217, which authorizes the Westlands Settlement, but additionally authorizes a related agreement (Northerly District Agreement) with three water districts in the northern reaches of the San Luis Unit service area. I will address H.R. 4366 first.

For over 28 years, there has been litigation surrounding drainage for lands served by the San Luis Unit (SLU) of the Central Valley Project (CVP). Currently, the Bureau of Reclamation is under a court order to provide drainage services to these impaired lands and the only drainage alternative that has undergone environmental and feasibility review will cost approximately \$3.8 billion in 2015 dollars. If settlement is not authorized, significant amounts of funding will be directed toward providing drainage services. In order to meet this court-ordered mandate, the Department may have to significantly reduce or potentially eliminate other programs.

The San Luis Unit (SLU) is part of the Bureau of Reclamation's (Reclamation) Central Valley Project (CVP) in California. Congress authorized the SLU on June 3, 1960, under Public Law No. 86-488. As originally authorized, the Act contemplated facilities to remove drainage water from irrigated lands to achieve a long-term, salt and water balance necessary to maintain sustainable agriculture in the SLU. Initial plans for drainage facilities included the San Luis Interceptor Drain (Drain), which would have collected drainage water and conveyed it for discharge into the Bay-Delta. By 1975, an 82-mile segment of the Drain (terminating at Kesterson Reservoir) had been constructed, which provided drainage to a portion of Westlands. Litigation over the United States' drainage obligation commenced short-

ly after the United States halted use of the San Luis interceptor drain and plugged all Federal drainage facilities in the SLU following the discovery of embryonic deformities of aquatic birds at Kesterson Reservoir. Kesterson Reservoir was emptied and, since that time, the United States has not resumed drainage service to Westlands. These details are a matter of public record, and my statement will summarize only the facts relevant to the legislation before the subcommittee today.

Following the closure of Kesterson Reservoir and the plugging of the Drain, two lawsuits were filed regarding the provision of drainage. *Firebaugh Canal Water District v. United States* was filed in 1988 by two water districts located outside and “downslope” of the SLU. The action was partially consolidated with *Sumner Peck Ranch, Inc. v. United States*, a similar action brought in 1991 by approximately 100 landowners located within the SLU. In 1995, following a trial, the district court entered a partial judgment that the Secretary of the Interior’s (Secretary) obligation under the San Luis Act to provide drainage was not excused or rendered impossible. In 2000, the Ninth Circuit largely affirmed the partial judgment, and on remand the district court entered an injunction (2000 Order Modifying Partial Judgment) against the Secretary requiring Reclamation to provide drainage service “without delay” to the SLU. In 2002, the United States settled the *Sumner Peck* plaintiffs’ claims.

In compliance with the 2000 Order Modifying Partial Judgment, the Department developed a Plan of Action outlining the steps it would follow to implement a drainage solution for the SLU. Following completion of an environmental impact statement, Reclamation issued a Record of Decision (ROD) in March 2007, in which Reclamation selected a drainage alternative that met the drainage service requirements of the district court’s injunction. The Department also prepared and submitted to Congress a feasibility report, concluding that the cost of implementing the selected alternative would be approximately \$2.7 billion (now \$3.8 billion in April 2015 dollars). That amount exceeds the remaining appropriations ceiling originally authorized for construction of the SLU. As a result, the alternative selected in the ROD cannot be fully implemented under existing law. As part of the ongoing litigation, the Department advised the district court in November 2009 that, while it could not implement the entire ROD, sufficient appropriation ceiling remained to allow it to construct one subunit of drainage facilities within a portion of Westlands. Reclamation began implementing the selected drainage plan in a subunit of Westlands in 2010 and in the Northerly Area of the SLU with construction of the Demonstration Treatment Plant in 2012, pursuant to a court ordered control schedule. Beyond that subunit, however, the Department remains unable to continue implementation of the ROD without additional congressional authorization. In 2012, the district court entered final judgment against the *Firebaugh* plaintiffs dismissing their remaining claims while maintaining jurisdiction to supervise compliance with the 2000 injunction requiring Reclamation to provide drainage service to drainage-impaired lands in the San Luis Unit.

On September 2, 2011, individual landowners within Westlands Water District filed suit in the Court of Federal Claims alleging that the failure by the United States to provide drainage service to their lands resulted in a physical taking of their property without just compensation in violation of the Fifth Amendment. Plaintiffs brought their suit as a class action on behalf of all landowners located within Westlands “whose farmlands have not received the necessary drainage service the United States is required to provide under the San Luis Act . . .” A plaintiff class has not yet been certified. A motion by the United States seeking dismissal of the takings claim was denied on September 20, 2013.¹ The Opinion contains language sharply critical of the United States’ delay in providing drainage to Westlands. The Court of Federal Claims has stayed this litigation to allow settlement negotiations to proceed, but is requiring the submission of regular status reports on the progress of the discussions. While the complaint does not specify a dollar amount for damages, estimates suggest that Federal liability for just compensation could range from zero to over \$2 billion.

On January 6, 2012, Westlands filed its own suit against the United States also in the Court of Federal Claims, alleging that the government’s failure to provide drainage service to the Westlands service area constituted a breach of Westlands’ 1963 Water Service and 1965 Repayment contracts (including the interim renewal of those contracts) with the United States. The United States moved to dismiss Westlands’ claims. On January 15, 2013, the Court of Federal Claims granted the United States’ motion to dismiss, ruling that none of the contracts contained an enforceable promise to provide drainage to Westlands.² Westlands has appealed to the

¹ *Etchegoinberry, et. al. v. United States*, 114 Fed. Cl. 437 (2013).

² *Westlands Water Dist. v. United States*, 109 Fed. Cl. 177 (2013).

Federal Circuit, and briefing on the appeal is complete. On December 2, 2015, the Federal Circuit granted a stay through January 20, 2017.

The Westlands Settlement resolves *Westlands Water District v. United States*, the remaining breach of contract case relating to the United States' drainage obligation. The Settlement also provides for the vacatur of the 2000 Order Modifying Partial Judgment in *Firebaugh Canal Water District v. United States*, allowing the United States to avoid the costs of meeting its statutory and court-ordered drainage obligation, currently estimated to be \$3.8 billion. The Settlement further provides a framework for resolving *Michael Etchegoinberry, et. al. v. United States*, the Fifth Amendment takings case brought by individual landowners within Westlands.

Interested parties have commented on the 2010 letter from the then-Commissioner of the Bureau of Reclamation to Senator Feinstein focusing on how the key legislative elements outlined in that letter differ from the Settlement ultimately negotiated by the parties. While the letter outlined key elements of a long-term drainage strategy that the Administration would support if Congress were to consider authorizing a resolution of the drainage issues in the SLU, the letter was not an Administration proposal for legislation. The Department's belief was that a legislative response was needed and the letter was an effort to facilitate Congress moving forward with a resolution. However, Congress took no action on the legislative elements the Department indicated it could support. Therefore, the Administration explored a negotiated resolution of the drainage problem with Westlands as a response to the projected costs of construction of drainage service facilities in Westlands under control schedules which had been submitted to the district court under the partial judgment and injunction. Moreover, Reclamation has grown increasingly concerned about the potential financial impact of compliance with the judgment on its ability to meet other priority programs. Lack of legislation by Congress, new legal challenges and financial concerns all played a significant role in the Department's decision to enter into settlement negotiations with Westlands and ultimately into the terms of the Settlement itself.

Benefits of the Westlands Settlement to the United States

- If enacted into law, the proposed legislation would amend the San Luis Act to relieve the Department from all drainage obligations imposed by that statute, including implementation of the 2007 ROD, the present cost of which is estimated to be \$3.8 billion.
- Westlands agrees to dismiss *Westlands v. United States*, the breach of contract litigation, and would join the United States in petitioning for vacatur of the 2000 Order Modifying Partial Judgment in the *Firebaugh* case, which presently requires Reclamation to implement drainage service.
- The Settlement establishes a framework for resolving all individual landowner claims in the *Etchegoinberry* takings case. Specifically, Westlands would participate in this case for settlement purposes and would provide compensation to affected landowners. Otherwise, potential exposure to Federal taxpayers from an adverse judgment could be as high as \$2 billion.
- Westlands agrees to release, waive and abandon all past, present and future claims related to drainage, and agrees to indemnify the United States for any and all claims from individual landowners relating to the provision of drainage service or lack thereof within its service area.
- Westlands agrees to permanently retire at least a minimum of 100,000 acres of lands within its boundaries utilizing those lands only for the following purposes:
 - a. management of drain water, including irrigation of reuse areas;
 - b. renewable energy projects;
 - c. upland habitat restoration projects; or
 - d. other uses subject to the consent of the United States.
- The Settlement transfers the legal obligation to manage drainage for lands within Westlands service area from the United States to Westlands. The United States will retain the ability to enforce this obligation through a contract term conditioning the U.S. obligation to make water available to Westlands upon its compliance with State and Federal law.
- Westlands agrees to cap its CVP water deliveries at 75 percent of its contract quantity. Any CVP water which Westlands would otherwise receive above this 75 percent cap would become available to the United States for other CVP authorized purposes.

- Westlands agrees that all drainage water will be disposed of within Westlands' district boundaries and that no drainage water will be discharged outside of Westlands' boundaries.
- As part of the Settlement, the United States would enter into a water service contract with Lemoore Naval Air Station to provide a quantity of CVP water to meet the irrigation needs of the Naval Air Station associated with air operations, and Westlands agrees to wheel CVP water made available to Lemoore.

Benefits of the Westlands Settlement to Westlands

- Westlands will be relieved of current, unpaid capitalized construction costs for the CVP, the present value of which is currently estimated to be \$295 million. Westlands will still be responsible for operation and maintenance costs, will pay restoration fund charges pursuant to the Central Valley Project Improvement Act and will be responsible for future CVP construction charges associated with new construction of the project (e.g. Folsom Reservoir Safety of Dams modifications).
- The Secretary will convert Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing terms and conditions and all terms of the Settlement. As a "paid out" project, the benefit of this conversion gives the district a contract with no expiration term, consistent with other paid out Reclamation projects. However, the contract will contain terms and conditions that are nearly identical to those in the current 9(e) contract, including the shortage provision.
- Westlands will be relieved of Reclamation Reform Act (RRA) (96 Stat. 1269) provisions relating to acreage limitations and full cost pricing. The RRA grants this relief on its face to projects that are considered "paid-out." Additionally, the tiered pricing provisions are triggered when a district receives 80 percent of its contract quantity, and as part of this settlement, Westlands water deliveries will be capped at 75 percent of its contract quantity.
- Westlands will also take title to certain facilities within its service area that it currently operates.

Several aspects regarding the obligation to provide drainage service were evaluated in determining the overall net benefit to the United States. Included in this consideration were avoided drainage construction costs, repayment to the United States of reimbursable costs, relief from Reclamation Reform Act fees, and unpaid CVP capital obligations. The United States would also benefit from avoided financial liability in the *Etchegoinberry* takings litigation, which could be as high as \$2 billion.

The Department recognizes that Westlands can realize efficiencies, such as local or in-house labor, reduced travel, and different purchasing requirements than Reclamation, that reduce its cost to implement drainage as compared to the costs that Reclamation would incur if Reclamation implemented the 2007 ROD. Nevertheless, while the scope of the drainage problem may have lessened in recent years due to drought and irrigation efficiencies, the Department is of the view that there will continue to be a need for substantial financial investment to alleviate drainage concerns in the San Joaquin Valley in the long term. While California has experienced a series of dry years recently, the historic hydrologic record indicates that wet cycles will return and the drainage challenge in the San Luis Unit will increase. With Westlands responsible for drainage within its boundaries, there is more incentive to increase irrigation efficiencies should new technology be developed in the future, which is a component of managing drainage that is largely outside of Reclamation's control. It should also be noted that Westlands will be responsible for implementing drainage in perpetuity. Costs will rise as drainage actions are implemented many years and potentially, decades into the future.

It is the Department's belief that the Settlement results in a savings to the American taxpayers when compared to the costs that would occur without the terms agreed to in the Settlement. Moreover, we are also of the view that failure to settle ongoing litigation will place the Department's ability to address the effects of the ongoing drought in both the short term and long term at risk due to the potential of significant amounts of appropriations being expended on providing drainage service. As a practical matter, should our efforts to settle litigation with Westlands fail, funding for programs throughout Reclamation are likely to be reduced in order for Reclamation to adequately fund the Control Schedule.

Were the Settlement not to be approved by Congress, Reclamation would still be obligated to implement drainage service to all drainage-impaired lands in the SLU as required under that Act and the injunction. To fully carry out that obligation,

Congress would need to increase the appropriations ceiling imposed by the San Luis Act and appropriate adequate funds to complete the work. Some members of the public and this subcommittee have expressed concerns with many aspects of the Settlement, and the Department appreciates those concerns and would note that this settlement is a unique situation stemming, in part, from a specific set of judicially imposed, legal requirements and should not be seen as precedential for future settlements. But it is the Department's view that in this specific case, the years of negotiation that have led to the Settlement and the introduction of H.R. 4366 have produced the best possible outcome for the people of California, the environment, and the American taxpayer. With the enactment of H.R. 4366, nearly three decades of litigation, enormous potential liabilities for the United States, and a longstanding environmental problem will be comprehensively resolved.

As stated above, the Department is also aware of the provisions of H.R. 5217 which would authorize the Northerly District Agreement. The Department believes that agreement is consistent with, and complementary to, the Westlands Settlement. However, the Office of Inspector General at the Department of the Interior is currently involved in an investigation, pending which, the Department is withholding a decision on the Northerly District Agreement and has no position on H.R. 5217 at this time.

STATEMENT ON DISCUSSION DRAFT H.R. ____, BLACKFEET WATER RIGHTS
SETTLEMENT ACT OF 2016

Chairman Fleming, Ranking Member Huffman and members of the subcommittee, I am John Bezdek, Counselor to the Deputy Secretary at the Department of the Interior (Department). I am here today to provide the Department's views on the discussion draft H.R. ____, the Blackfeet Water Rights Settlement Act of 2016, which would provide approval for, and authorizations to carry out, a settlement of the water rights claims of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana. The Department is supportive of the discussion draft H.R. ____, the Blackfeet Water Settlement Act of 2016, and looks forward to working with the committee to consider this legislation.

The Department supports resolving Indian water rights claims through negotiated settlement. Our general policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement.

Disputes over Indian water rights are expensive and divisive. In many instances, Indian water rights disputes, which can last for decades, are a tangible barrier to progress for tribes, and significantly, hinder the rational and beneficial management of water resources. Settlements of Indian water rights disputes break down these barriers and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. That certainty provides opportunities for economic development, improves relationships, and encourages collaboration among neighboring communities. This has been proven time and again throughout the West as the United States has pursued a policy of settling Indian water rights disputes whenever possible. Indian water rights settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

Today, implementing existing settlements and reaching new agreements is more important than ever given the need for water on many Indian reservations and throughout the West and the uncertainty regarding its availability due to drought, climate change, and increasing demands for this scarce resource.

The Treaty with the Blackfeet in 1855 encompassed some 27,500 square miles of Blackfeet tribal lands in what was to become Montana. The discovery of gold in the early 1860s brought the first wave of non-Indians into the territory, along with increasing pressure to open the Reservation to non-Indian settlement. A series of Executive Orders reduced and reconfigured the Reservation and then in 1888, it was divided into three separate and smaller reservations: the Fort Belknap Reservation, the Fort Peck Reservation, and the Blackfeet Reservation. The Blackfeet Reservation was further diminished in 1895 (Agreement of September 19, 1895, ratified on June 10, 1896, 29 Stat. 321, chapter 398, hereafter "1895 Agreement"), when the

United States purchased from the Tribe 800,000 acres of land along the western boundary of the Reservation.

In the 1895 Agreement, the United States promised that the Reservation would not be allotted without ‘the consent of the adult men of the Tribe’ (Article V), and that if the government were to build a canal to control the abundant supply of water available seasonally in the St. Mary River, the canal would be constructed to provide irrigation water for the Reservation (Article III and Meeting Minutes). Within just a few years, the Reservation was opened to allotment; construction of a canal to capture the supply of the St. Mary River had begun but the canal was designed and constructed to divert St. Mary water off of the Reservation for the benefit of the Milk River Project, located some 200 miles away, and not for the benefit of the Tribe. In 1909, the United States entered into a treaty with Canada apportioning the waters of the St. Mary and Milk Rivers. This Treaty did not specifically address the water rights of the Blackfeet Nation and other tribes, even though it was concluded just after the United States Supreme Court handed down its 1908 decision in *Winters v. United States*—a case involving the Milk River, which established the doctrine of Federal Indian reserved water rights.

The Tribe’s water rights have been fought over for more than 100 years, as reflected in approximately 14 court cases and congressional proceedings addressing directly or indirectly the use and control of the Reservation’s water resources. Modern efforts to quantify the Tribe’s reserved water rights began in 1979 when the state of Montana (State) filed suit in State court as part of the statewide water rights adjudication proceeding. At the same time, the United States filed a case in Federal court in Montana to adjudicate the Tribe’s reserved water rights claims. The question of jurisdiction that arose as a result of the two lawsuits was decided in 1983 by the United States Supreme Court, which held that state court was the appropriate forum to adjudicate tribal reserved water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666.³

In 1989, the Tribe initiated negotiations with the Montana Compact Commission and in 1990 the Department appointed a Federal Negotiation Team to assist in achieving a negotiated settlement of the Tribe’s reserved water rights claims. The State and the Tribe reached an agreement in 2007, in the form of a Compact, which the Montana Legislature approved in 2009. Federal legislation to authorize the Compact was first introduced in 2010. Since then the Administration has been negotiating with the Tribe and the State to resolve important Federal concerns relating to cost, cost sharing, Federal interests, and Federal responsibilities. Those negotiations lowered the Federal cost of the settlement by approximately \$230 million.

The Blackfeet Water Rights Settlement will provide many benefits, as it resolves all outstanding Blackfeet water claims, quantifies a tribal water right to more than 750,000 acre-feet of surface water and nearly all groundwater on the Reservation, and funds the construction and rehabilitation of water related infrastructure on the Reservation for the benefit of the tribal community. Federal settlement funding will provide lasting benefits for the Tribe and its members, by protecting public health and creating substantial numbers of temporary and permanent employment opportunities on the Reservation, including opportunities in the construction, water management, renewable energy, agricultural, recreation, and tourism industries. The Settlement also includes a process that will enable the Blackfeet Tribe and the Fort Belknap Indian Community to resolve a conflict that exists between them over relative rights to use the Milk River. The settlement process provides funding to support the Tribes’ efforts to reach a resolution, and authorizes the Secretary to establish criteria to provide for such an arrangement if the tribes do not reach a successful sharing arrangement. This settlement is a crucial and long-awaited step toward achieving the permanent tribal homeland promised to the Blackfeet Tribe in the treaties and agreements ratified by Congress between 1855 and 1896 that serve as the foundation of the relationship between the Tribe and the United States.⁴

Settlement funding focuses primarily on Federal programmatic responsibilities, including funding for dam safety repairs and deferred maintenance for Bureau of Indian Affairs facilities on the Reservation;⁵ increasing water storage capacity for

³ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The Federal Court action has been stayed since 1983 pending the outcome of the State adjudication.

⁴ *Treaty with the Blackfeet*, 1855, Oct. 17, 1855, 11 Stat., 657, Ratified Apr. 15, 1856, Proclaimed Apr. 25, 1856, *Act of April 15, 1874* (18 Stat. 28, chapter 96), *Agreement of 1888*, ratified by the Act approved May 1, 1888 (25 Stat. 113), *Agreement of 1895*, dated September 26, 1895, ratified by the Act approved June 10, 1896 (29 Stat. 321, 353), Criteria and Procedures, No. 10.

⁵ Indian Dam Safety Act of 1994, 25 U.S.C. § 3801 et seq.

irrigation and other economic activities on the Reservation;⁶ construction, rehabilitation, and expansion of the Blackfeet Regional Water System to provide safe, clean drinking water to all of the Reservation's major population centers;⁷ improving tribal irrigation projects with on-farm improvements for tribal trust lands;⁸ and establishing the Blackfeet Tribal Water and Energy Office to support self-determination and enhance the Tribe's capacity to manage its trust resources.

The Blackfeet Reservation is set up against the Rocky Mountains and possesses some of the most spectacular scenery in the United States. It provides significant habitat for countless wildlife and fish species, including many protected species. Reservation fisheries are world renowned. Yet, the Reservation struggles with high unemployment, extreme poverty, and a lack of employment opportunities. The Reservation ranks as the 5th poorest reservation in the United States. The American Community Survey of 2014 calculates the poverty rate on the Reservation at nearly 40 percent, with unemployment at more than 20 percent, and the share of the population that did not work in the previous 12 months even higher, at 39.1 percent. In addition to these bleak statistics, at least 30 percent of Reservation households live in housing that lacks complete plumbing or kitchen facilities and more than 80 percent of school age children are eligible for free or reduced school lunches.

The improvements to irrigation infrastructure on the Reservation should have a major beneficial impact on the tribal economy, which is a rural economy dependent on farming and ranching and associated hay and alfalfa farming operations. Settlement funding will also provide vital improvements for the Tribe's farming and ranching activities, including the significant bison herds maintained by the Tribe. Such activities are an important source of tribal revenues and an important source of jobs for tribal members. Settlement funds will also support improvements to tribal lakes and fisheries, providing important habitat improvements as well as recreational and economic development opportunities that take advantage of the natural environment. Such activities will contribute to increased tribal revenues and allow the Tribe to provide better and more comprehensive services to tribal members.

The Blackfeet Water Settlement funding may add significant temporary and permanent job opportunities for tribal members on the Reservation. These benefits will derive from Federal spending on important water related infrastructure projects and improvements.

The Settlement will also provide water supplies and increased water storage capacity which will help the Tribe establish better economic conditions to support a viable homeland for its members. The funding to construct, rehabilitate, and expand the Tribe's municipal water system will ensure all major population centers on the Reservation have reliable and safe drinking water supply for 50 years into the future. Currently, the Tribe experiences school closures and business disruptions because of the unreliability of municipal water systems, and has had to operate under a "boil order" for more than a decade in a major population center until the Tribe was able to cobble together grants, loans, and its own funds to update part of its system.

The Blackfeet Water Settlement also provides important benefits to American taxpayers and the state of Montana. The final quantification of the Tribe's reserved water rights will bring stability for all water users within the State and will provide the certainty and reliability necessary to sustain the economy of the State without disruption. As originally proposed to this Administration, the Blackfeet Water Settlement included Federal funding of more than \$650 million. The Department scrutinized every Federal dollar in the original proposal, and worked closely with the Tribe and the State to reduce the overall cost of the settlement by well over \$200 million and increase State cost share. The State's direct contribution to the Blackfeet Water Settlement is now \$49 million, a substantial and appropriate direct state cost share. While the current Blackfeet Water Settlement authorizes substantial Federal funding requirements through Fiscal Year 2025, we have confirmed that this level of funding is necessary in order for the Tribe to develop its capacity to manage and develop its water resources.

⁶25 U.S.C. § 13, "the Secretary of the Interior . . . shall expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians . . . for development of water supplies." (Emphasis supplied).

⁷It is "the policy of the United States that all Indian communities and Indian homes, new and existing be provided with safe and adequate water supply systems . . . as soon as possible." 25 U.S.C. § 1632(a)(5).

⁸1907 Blackfeet Allotment Act.

Important Federal proprietary interests in Glacier National Park (Park), the Lewis and Clark National Forest (Forest), the Bowdoin National Wildlife Refuge, and the Milk River Project will be protected by the settlement. The Park and Forest will enjoy protection of important instream flows with early priority dates. Federal funding also will address important obligations of the Bureau of Reclamation on the Reservation and provide compensation to the Tribe for deferring water use.

Notably, the Settlement will resolve or provide a process for resolving disputes and any Federal liability regarding the Milk River Project. Reclamation's use and occupancy of Reservation lands for the St. Mary Canal and other features of the Milk River Project has been disputed by the Tribe for more than 100 years. Under the process described in section 7 of the Settlement Act, the dispute will be resolved, and the parties' legitimate interests will be protected going forward on a permanent basis. Additionally, the Tribe has filed objections to the Milk River Project water rights claims that are pending in the Montana general stream adjudication. The Tribe will withdraw its objections in certain basins at the request of the United States. The United States will realize tremendous value from the resolution of these two disputes in addition to the consideration from the Tribe's waivers of legal claims for damages relating to its water rights and water resources. Avoidance of these potential money damage awards against the United States represents additional and very significant benefits for the Federal Government and the American taxpayer.

That concludes my written statements. I would be pleased to answer questions at the appropriate time.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. HUFFMAN TO MR. JOHN BEZDEK,
COUNSELOR TO THE DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR

Mr. Bezdek did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Question 1. Please provide an estimate of the total financial benefit that would be provided to San Luis Unit contractors if H.R. 4366 and H.R. 5217 are enacted. Please include financial benefits associated with waiving Central Valley Project (CVP) repayment obligations, Reclamation Reform Act waivers, title transfers of property owned by the Federal Government and other direct and indirect financial benefits contained in both bills.

Question 2. Under the settlement agreements, does the waiver of CVP repayment obligations include the capital obligation for the Trinity River Division facilities including the Trinity River hatchery?

Question 3. If the settlement agreements are enacted, how much Trinity River Division water will be allocated under the new 9(d) contracts provided for in the settlements?

Question 4. As Trustee for the Hoopa Valley Tribe, how can the Administration agree to a settlement based on a CVP water supply to which the trust beneficiary tribe has first priority under Reclamation law without ensuring that any pending dispute the San Luis Unit contractors have about that priority is fully and finally resolved in the beneficiary's favor?

Question 5. Section 3404(c)(2) of the Central Valley Project Improvement Act (CVPIA) requires the Secretary of Interior to incorporate in any contract for CVP water the provisions of the CVPIA and other law. Will you agree to fulfill that requirement in the agreements that would be authorized by the settlement, including: (1) the CVPIA requirement for contractors to pay for the costs of the Trinity River Restoration program for as long as water is diverted by the Trinity River Division; (2) acceptance of the separate priorities provided for in section 2 of the 1955 Act authorizing the Trinity Division and senior to diversions to the Central Valley? If not, why not?

Question 6. Why does the Administration believe that this drainage settlement should proceed when fundamental issues regarding entitlement to water for delivery to the San Luis Unit remain unresolved? If San Luis Unit contractors are not entitled to the water being sought in this settlement, wouldn't a consequent reduction in water deliveries to the San Luis Unit potentially resolve a portion of the drainage problem by reductions in CVP water deliveries to the San Luis Unit?

Question 7. On December 23, 2014, the Solicitor of the Department of Interior issued Opinion M-37030 regarding Trinity River Division Authorization's 50,000 Acre-Foot Proviso and the 1959 Contract between the Bureau of Reclamation and Humboldt County. In the 18 months since then, have the Department's water managers accounted for that opinion's conclusion in CVP operations models and estimates of water supply? If yes, what has the Department done. If not, why not?

Question 8. In an April 21, 2016 letter to Representative David Valadao, Deputy Interior Secretary Michael Connor states that "it is widely recognized that the drainage issue may have lessened over the last few years due to drought and irrigation efficiencies." Has the Department of Interior developed any updated calculations since the 2007 Record of Decision to estimate the *current* cost of providing drainage to the San Luis Unit? If no updated estimates have been developed, does the Department of Interior believe—based on increased irrigation efficiencies and other developments since the 2007 Record of Decision—that a current estimate of drainage costs would be less than the costs identified in 2007?

Question 9. The Termsheet on the proposed Northerly District Agreement is vague about the future status of the San Luis Drain and the future management and cleanup of sediments in the Drain. Under some scenarios the future management of the Drain and its sediments could have an adverse impact on national wildlife refuges and other wetlands that Interior Department agencies are supposed to protect under numerous laws. For example, Section 3406(d) of the Central Valley Project Improvement Act requires the Secretary of Interior to maintain and improve wetland habitat areas in California, including by providing water supplies and supporting the objectives of the Central Valley Habitat Joint Venture. In accordance with the Department of Interior's wetlands-related responsibilities, what is the Department's plan for the future management of the San Luis Drain in and around the Grasslands complex of state, Federal and privately managed wetlands? How will the Department of Interior ensure that all potential impacts from the Drain and its future management and cleanup will not adversely impact these wetlands and the numerous species they support *before* the Department of Interior and the Bureau of Reclamation relinquish Federal control of the Drain?

Dr. FLEMING. Thank you, Mr. Bezdek.
Mr. Ellis, you are now recognized.

**STATEMENT OF STEVE ELLIS, VICE PRESIDENT, TAXPAYERS
FOR COMMON SENSE, WASHINGTON, DC**

Mr. ELLIS. Thank you. Good morning, Chairman Fleming, Ranking Member Huffman, and members of the subcommittee. Thank you for the opportunity to testify on H.R. 4366 and H.R. 5217. I am Steve Ellis, Vice President of Taxpayers for Common Sense, a national, non-partisan budget watchdog.

In essence, the two agreements that would be implemented by these bills absolve the United States from providing drainage to several California water districts in exchange for numerous new benefits to the districts. At this time, Taxpayers for Common Sense (TCS) opposes this legislation. It is not that we do not want to see a resolution to this fight; we absolutely do. We just don't think this is the best or even a good deal for taxpayers.

This deal would end the court-mandated requirement that the United States provide drainage, and shift that responsibility to the districts. But considering Reclamation estimated the effort would cost billions of dollars, it is not clear how the districts would pay for it. The legislation contains no practical enforcement measures to ensure adequate drainage, or even provisions for monitoring and testing.

Westlands Water District has estimated that drainage will cost "hundreds of millions of dollars, not billions." It may not initially

seem relevant, but Westlands recently paid a penalty to settle an SEC enforcement action over misleading investors regarding their finances during a bond offering in 2012. How? Westlands used self-described “Enron accounting” to manipulate their books to avoid raising water rates for their customers. Similar accounting practices might explain how Westlands anticipates lower costs, but that does not ensure taxpayers that Westlands can meet its drainage obligation.

Under this agreement, Westlands landowners could continue to grow crops on their land until they can’t any more, and then start reselling the promised water. Or they could use the affected lands for solar energy development and sell the water. Or they could retire more acres and grow more profitable crops on a smaller subset of lands. TCS would not oppose any of these options, but it would mean that the value of the drainage obligation that the United States is shedding is a pittance compared to what Westlands is getting.

Land retirement is a primary strategy for reducing drainage impacts. But the Northerly Districts’ agreement requires no land retirement at all, and the Westlands agreement only retires 100,000 acres. It has been widely reported that much of this land has already been retired. Both Westlands and Reclamation have previously suggested multiple times that 200,000 acres should be retired. So, including only half as much in this agreement is surprising. Since drainage impact and costs will likely push Westlands to retire at least 200,000 acres, in my opinion, this deal is really about the water.

In a 2010 letter to Senator Feinstein, then-Commissioner Connor stipulated that contract amount of water for Westlands should be reduced by a proportion equivalent to the amount of land retired. Less land to irrigate, less water needed. The agreement abandons this common-sense proposition, and does not reduce the contract amount. Instead, it keeps the total contract amount, then stipulates that Westland should get 75 percent of that, or 895,000 acre-feet.

By promising that future allocations will be based on the full 100 percent contract total, rather than a reduced amount, it ensures that Westlands will always get a larger share, relative to other CVP junior contractors. In addition, under the agreement, Westlands would be considered to be paid out, and their water contract would convert from a 9(e) water service contract to a permanent 9(d) contract. If Westlands retires more land in the future, the excess water not used on that land would be money in the bank. The excess water delivered at artificially low rates would become highly valuable in the market.

The right choices for water distribution in California vary over time, based on a myriad of factors. At a minimum, giving Westlands permanent water rights to water should have been analyzed for its impact on other future Federal and taxpayer obligations. Reclamation has presented a calculation that was shown earlier of the purported financial savings to the United States from this deal. Economic analysis is only as good as the assumptions that accompany it, and that is where this analysis fails.

Deputy Secretary Connor stipulates that the analysis relies on “current applicable law.” This fails to recognize these bills are, in fact, making law and could improve financial terms for the taxpayer. Under current applicable law, which dates back to 1902, the districts would have 40 years to repay billions of dollars at no interest. The last dollar would be paid in 2070. I reject the savings analysis because of this fundamental assumption.

Though current law allows for such repayment terms, current law also provides only \$513 million in remaining construction authority for the San Luis Unit. Additional legislation providing billions of dollars in budget authority and appropriations would be necessary before drainage construction could start. New law, new terms.

Taxpayers for Common Sense has long been on the record that there should be significant reforms to water project financing and to price water to reflect market realities. A reauthorization of the San Luis Unit would provide an ideal opportunity to change these decade-old policies. I want to reiterate that TCS wants this issue to be resolved. But these agreements and this legislation do not resolve the issue in a way that is fair to taxpayers.

Thank you for the opportunity to testify and I will be happy to take any questions you might have.

[The prepared statement of Mr. Ellis follows:]

PREPARED STATEMENT OF STEVE ELLIS, VICE PRESIDENT, TAXPAYERS FOR COMMON SENSE ON H.R. 4366 AND H.R. 5217

Good morning Chairman Fleming, Ranking Member Huffman, and members of the subcommittee. Thank you for inviting me to testify. I will be focusing on H.R. 4366 and H.R. 5217, both of which would formalize agreements between the United States and Westlands Water District¹ and the Northerly Districts.² I am Steve Ellis, Vice President of Taxpayers for Common Sense, a national non-partisan budget watchdog.

In essence, the two agreements absolve the United States from providing drainage for irrigation water sent to the districts in exchange for numerous new benefits to the districts:

- Drainage would become the responsibility of the districts.
- In return the districts would be deemed to have paid off all capitalized construction costs for the Central Valley Project (currently estimated at over \$400 million in total). Thus the districts would be given permanent contracts for their water at a far cheaper price, along with other benefits such as transfer of various Federal facilities, waiver of Federal farm size limits, and a new Federal commitment to permanent water deliveries from the Central Valley Project (CVP) (because of delayed environmental reviews and controversies the four districts currently only have been only able to obtain 2-year extension contracts for such deliveries for several cycles. Without these bills, under the CVP Improvement Act (CVPIA) these would be 25-year contracts).
- The Westlands agreement also would help resolve several different ongoing rounds of litigation and Westlands would permanently retire 100,000 acres of its 600,000-acre district (we understand most of these lands have already been retired under various prior programs or agreements).
- The Northerly Districts (San Luis, Panoche, and Pacheco Water Districts) would also receive a new Federal payment of \$70 million.

There are other factors in the agreements, but these are the main ones I will be discussing. Also, the full Northerly District agreement has not been finalized, so my

¹ Available at <http://www.usbr.gov/mp/docs/Notice-of-Filing-Settlement-Agreement-AS-FILED-with-attachment-091615.pdf>.

² Commentary based on Summary of Termsheet for a Proposed Settlement Between the United States and the Northerly San Luis Unit Districts Regarding Drainage from October 29, 2015.

commentary will be mostly Westlands-focused, but would still generally apply to what I have seen about the other proposed agreement.

At this time, Taxpayers for Common Sense is opposed to the legislation. It is not that we don't want to see a resolution to this fight. We absolutely do. We just don't think this is the best or even a good deal for taxpayers.

DRAINAGE

It is true that this deal would end the court-mandated requirement that the United States provide drainage for these districts. The districts would take on the responsibility for ensuring adequate drainage. But considering that the cost of providing drainage for these districts is estimated in the billions of dollars, it is also not clear how the districts would be able to do this.

There have been suggestions that drainage supplied by the districts would entail small-scale treatment, growing salt-tolerant crops, more efficient irrigation, and I would imagine further land retirement. Westlands has estimated that this will cost "hundreds of millions of dollars."³ Not billions. But there is no guarantee that this will actually happen.

This disparity in cost estimates is even harder to credit considering that Westlands recently paid a penalty to settle a Securities Exchange Commission (SEC) enforcement action over misleading investors regarding a \$77 million bond offering in 2012. The SEC found an order-of-magnitude disparity in the promised debt service coverage ratio and the actual coverage ratio. Why? Because Westlands used self-described "Enron accounting" in an effort to not raise water rates for Westlands customers.⁴ Similar accounting practices might explain how Westlands anticipates costs an order of magnitude lower than the Reclamation estimated costs, but they don't provide sufficient assurances to the taxpayers that Westlands can meet its drainage obligation.

The agreements and certainly the legislation contain no practical enforcement measures to ensure that the districts will provide adequate drainage, or even provisions for monitoring and testing. The only apparent "enforcement" tool is that if the United States somehow learns that any of the districts has somehow violated applicable law, the United States could (but is not required to) impose the ultimate sanction of stopping all water deliveries to the district—a rarely used Federal power around the West.

Thus, under this agreement, Westlands landowners could continue to grow crops on their land until they can't anymore and then start reselling the promised water (either within the district or to cities or farms outside the district). Or they could use the affected lands for solar energy development and sell the water. Or they could retire more acres and grow more profitable crops on a smaller subset of lands. TCS wouldn't oppose any of these options, but it would mean that the value of the drainage obligation government is shedding is a pittance compared to what Westlands is getting, and TCS would prefer that the government make a better deal in exchange.

LAND RETIREMENT

The Northerly Districts' agreement requires no land retirement at all, and the Westlands agreement includes a provision for Westlands to retire 100,000 acres from the 600,000-acre district. It has been widely reported that much of this land has already been retired. Furthermore it is a paltry amount considering what had been discussed in the past. In 2002, the top Westlands official wrote in the *Bakersfield Californian* that they were considering removing 200,000 acres from production—proudly stating it was one-third of the district—as part of an earlier proposed drainage settlement.⁵ The government's 2007 Record of Decision on the drainage issue recommended that nearly 200,000 (194,000) acres be retired.⁶ And in a 2010 letter to Sen. Feinstein (D-CA), then-Commissioner of Reclamation Michael Connor (current Deputy Secretary of Interior) wrote that Westlands should

³Bettina Boxall Los Angeles Times "Westlands Water District Agreement a Retreat From Previous U.S. Plan." September 22, 2015. Available at: <http://www.latimes.com/science/la-me-westlands-20150922-story.html>. Quote from Tom Birmingham, General Manager Westlands Water District.

⁴SEC Press Release "California Water District to Pay Penalty for Misleading Investors," March 9, 2016. Available at <https://www.sec.gov/news/pressrelease/2016-43.html>.

⁵Bakersfield Californian "Another View/Tom Birmingham: Westlands Seeks to Help All Farmers," May 1, 2002.

⁶San Luis Drain Feature Re-evaluation Record of Decision March 2007. Available at http://www.usbr.gov/mp/mp150/envdocs/San_Luis_Drainage_Feature_Re-evaluation_ROD.pdf.

be “required to permanently retire a minimum of 200,000 acres of the most drainage impaired lands” as part of a settlement.⁷

Considering the consensus on 200,000 acres from so many parties—including both Westlands and Reclamation—only including 100,000 acres in the agreement is surprising at best. It’s very likely that between lands too salt-impacted/drainage-impaired for cultivation and an effort to reduce drainage costs, Westlands will retire at least 200,000 acres if not more. In my opinion this deal is really about water.

WATER

How is land retirement tied to water? In the 2010 letter to Sen. Feinstein, then-Commissioner Connor stipulates that the current contract amount of water for Westlands (1.193 million acre-feet) should be reduced by a proportion equivalent to the amount of district land retired. This was estimated to result in a new contract total of 806,000 acre-feet (still an enormous amount of water and a generous 70 percent of the old contract amount). It only makes sense. Less land to irrigate, less water needed. The agreement abandons this common-sense proposition and doesn’t reduce the contract amount. Instead it stipulates in effect that Westlands should get 75 percent of the contracted amount or 895,000 acre-feet. In wet years, water in excess of that would be available to Reclamation for their use or to resell to others, including Westlands, in Reclamation’s sole discretion.

First, the higher total contract amount means tiered water pricing (water price increases for amounts delivered in excess 80 percent of total contract amount) would never come into effect. Instead of having to pay higher-tiered prices at 80 percent of the water potentially delivered to its smaller land area, Westlands would at maximum receive 75 percent of the higher contract amount. The 75 percent level would in effect become 100 percent of what Westlands is entitled to under the law if H.R. 4366 or H.R. 5217 is enacted, and the higher-tiered pricing would never go into effect.

Also, if a higher land retirement figure were used—like say, 200,000 acres, twice what is in the agreement—it would be hard to justify (under both state and Federal legal principles) contracting for that much water to be delivered and not change the total contract amount. And by promising that future annual allocations will be based on the full 100 percent contract total, rather than a reduced amount (whether 70 or 75 percent), it ensures that Westlands will always get a larger share relative to other CVP junior contractors who have allocation percentages based on their actual contract amounts.

In addition, under the agreement Westlands would be considered to be “paid out” and their water contract would convert from a 9(e) water service contract to 9(d) repayment contract. This would be a permanent contract as opposed to the normal contract renewals that should occur every 25 years under the CVPIA. In his letter to Sen. Feinstein, then-Commissioner Connor supported the idea of a longer-term contract than 25 years, but not a permanent contract. Promising a permanent contract with total amounts that are set in binding agreements and/or Federal statute regardless of potential future impacts population growth, other business users, climate change, or other factors disregards the long history of water strife and challenges faced in the arid West. At a minimum, such a proposal should have been analyzed for its impact on other Federal and taxpayer obligations before the Administration signed a Settlement Agreement committing the United States to such a new policy for Westlands.

If, as we suspect will happen, Westlands goes ahead and retires more land, that excess water would be money in the bank. The excess water they received at artificially low rates would then, obviously, become much more valuable in the market.

TRUE VALUE

Speaking of money, in an April 21, 2016 letter to Congressman David Valadao (R-CA, and author of H.R. 4366) regarding the Westlands agreement, Deputy Secretary of Interior Michael Connor attaches a table entitled “U.S. Bureau of Reclamation’s Assessment of Costs and Benefits to Federal Government of Westlands’ Drainage Settlement (Presented in Present (2015) Net Worth).”⁸ This net present value analysis discounts future costs and savings to account for the time value of money and bring everything into 2015 values. This analysis estimates the agreement would save the government a little less than \$1 billion—\$968.9 million.

⁷Letter from Michael L. Connor, Commissioner, U.S. Department of Interior to Senator Dianne Feinstein, September 1, 2010

⁸Letter from Michael L. Connor, Commissioner, U.S. Department of Interior to Representative David Valadao, April 21, 2016.

This is absolutely the economically appropriate way to analyze the deal. Money coming in two decades or more from now is less valuable than money today. But economic analysis is only as good as the assumptions that accompany it. That is where this analysis fails.

Deputy Secretary Connor stipulates that the analysis used “current applicable law.” Such an analysis fails to consider that these bills are in the process of making law, and could instead alter expectations to improve financial arrangements for the taxpayer. The “current applicable law” goes back to the Reclamation Act of 1902. That means the beneficiaries of the drain would not have to start repaying for the project until it is complete. And under “current applicable law” the beneficiaries would have 40 years to repay at no interest. Zero, zilch, nada.

Reclamation’s analysis anticipates the Congress would appropriate and the United States would spend \$2.5 billion on drainage to complete the project by 2030. In 2070, when the last of the \$2.5 billion loan is repaid, the net present value of that total repayment in 2015 would be only \$1.2 billion. These long-term, no-interest loans arguably made sense at the beginning of the last century as small farmers got started and Reclamation was encouraging settlement of the West. Providing a 40-year no-interest loan in 2016 to Westlands—a wealthy, powerful water district that brags that its growers produce more than \$1 billion worth of food and fiber every year—makes no sense.⁹ I reject the savings analysis because of its fundamental assumptions.

AUTHORITY

Even if it is true that the law of the land still allows for such repayment terms, it is also true that under the law providing for the construction of the San Luis Unit there was only \$513 million in remaining available authority as of 2015.¹⁰ So to even construct the drain and an equivalent new drainage system, additional legislation providing billions of dollars in budget authority and appropriations would be necessary before construction could be initiated. New law, new terms. Taxpayers for Common Sense has long been on the record that there should be significant reforms to water project financing and to price water to reflect market realities. A reauthorization of the San Luis Unit would provide an ideal opportunity to change these decades-old policies. The facts of the Westlands situation are a perfect recipe for such fiscal and pricing reforms to reflect the new realities that have developed since the 1902 Act and the 1960 San Luis Act.

CONCLUSION

I want to reiterate that TCS wants this issue to be resolved. But we don’t think that these agreements and this legislation resolve the issue in a way that is fair to taxpayers.

Thank you for the opportunity to testify and I will be happy to take any questions you might have.

Dr. FLEMING. Thank you, Mr. Ellis.
Mr. Brown, you are recognized for 5 minutes.

STATEMENT OF JERRY BROWN, GENERAL MANAGER, CONTRA COSTA WATER DISTRICT, CONCORD, CALIFORNIA

Mr. BROWN. Thank you, Chairman Fleming, Ranking Member Huffman, and members of the subcommittee. Contra Costa Water District (CCWD) is the oldest and largest M&I contractor within the Central Valley Project, and we rely on the Delta to divert and deliver high-quality drinking water through CVP and our own facilities to our 500,000 residents and many large industrial customers. Anything discharged upstream in the San Joaquin Valley ends up downstream in the Delta. Any mistakes in these San Luis

⁹ <http://wwd.ca.gov/about-westlands/>.

¹⁰ Bureau of Reclamation U.S. v. Westlands Settlement Agreement Fact Sheet, Oct. 2015. Available at <http://wwd.ca.gov/wp-content/uploads/2015/10/westlands-vs-united-states-settlement.pdf>.

drainage agreements will compromise the Delta water quality we drink and use every day.

CCWD has spent over \$1 billion over the past 20 years to build infrastructure to protect and improve our drinking water quality. Unfortunately, the pressure on our assets to perform this critical function grows greater every day, as Delta water quality continues to decline. For the past 30 years, Contra Costa has worked with other Delta stakeholders, including Delta communities and environmental groups to prevent the export of toxic drainage from the San Luis Unit to the Delta. This includes opposing the building of the San Luis drain to the Delta, as well as opposition to drainage discharges within the San Joaquin River and, thus, ultimately reaching the Delta.

CCWD supports an in-valley drainage solution in keeping with the 2007 Bureau of Reclamation Record of Decision on the San Luis drainage feature re-evaluation. It is essential that drainage is not exported to the Delta. However, as they say, the devil is in the details, and the details of how drainage will be managed are lacking in the Westlands settlement agreement and the Northerly Area agreement.

To ensure that the many beneficial uses of the Delta are not impacted, the proposed legislation enacting these agreements needs to be amended in three key areas.

First, the agreements both lack drainage management plans. This is despite the Obama administration letter to Diane Feinstein dated September 1, 2010 that identified as key elements to any drainage settlement measurable environmental objectives, including water quality and specific enforceable performance measures. While the Westlands settlement states that Westlands must manage its drainage as a condition for receiving CVP water, the enacting legislation and agreements lack any definition of detailed drainage management plans that are required for monitoring, reporting, and enforcement measures.

Second, the agreements call for inadequate amounts of land retirement. Land retirement has been acknowledged to be the best way to prevent drainage impacts. The 2007 Record of Decision selected a final alternative with 194,000 acres of land retirement, which in itself was already less than the 308,000 acres of land retirement identified in the lowest net cost alternative recommended by the USGS and U.S. Fish and Wildlife Service. However, the Westlands settlement only requires 100,000 acres of land retirement, and the Northerly agreement has no land retirement.

Furthermore, the total contracted amount specified for the San Luis Unit CVP contract should be reduced proportional to the amount of land retired. Instead of reaffirming the San Luis contractor's full contract supply and converting these existing contract to permanent contracts, the agreement should promote water conservation and irrigation efficiency by retiring the water rights linked to the irrigation of retired lands.

Third, the agreements have the potential to harm other CVP contractors. CCWD and other CVP contractors are already concerned about the decreasing reliability of the CVP water supply in general. Replacing the San Luis Unit contractor's renewable contracts with permanent contracts without legally binding and

enforceable provisions added to the contracts will harm the rest of the CVP. Congress never intended San Luis users to be given a priority over other CVP contractors, but priority is implied by granting the San Luis Unit users guaranteed permanent contracts.

The March 18, 2016 memo from the Congressional Research Service to Congressman Jared Huffman regarding the Westlands drainage settlement describes several ways that CVP contractors would be harmed by the settlement. In order to avoid adverse impacts to water supply of other contractors, the San Luis Unit contract amounts need to be subject to review at regular intervals, particularly in the face of changing hydrology in California due to climate change or completion of the California water fix, or other actions.

Also, forgiving the San Luis Unit contractors' capital repayment debt must not hurt other CVP contractors by shifting recovery of cost to us. The legislation must specifically address how the \$420 million cost will be recovered in the Federal budget without shifting costs to other CVP contractors.

Thank you for this opportunity to testify on this topic of vital importance to CCWD and the Delta.

[The prepared statement of Mr. Brown follows:]

PREPARED STATEMENT OF JERRY BROWN, GENERAL MANAGER, CONTRA COSTA WATER DISTRICT ON H.R. 4366 AND H.R. 5217

My name is Jerry Brown, and I am the General Manager of Contra Costa Water District (CCWD). Contra Costa Water District is an urban water agency located in the eastern end of the Bay Area in Northern California, on the western edge of the Sacramento-San Joaquin Delta. CCWD is the oldest and largest M&I contractor within the Central Valley Project, we are in the Delta, and we rely on the Delta to deliver high quality drinking water to our 500,000 residents and many large industrial customers. We own facilities and divert water from the Delta under our own permits and approvals. We also operate and maintain CVP facilities for the Bureau of Reclamation. Unlike other urban areas which also rely on the Delta and have other sources of supply, almost all of our water comes out of the Delta. Anything discharged upstream in the San Joaquin Valley ends up downstream in the Delta, and any mistakes in these San Luis Drainage agreements will compromise the Delta water quality we drink and use every day.

CCWD has a unique standing in the Delta. We are known for having a strong technical acumen on Delta issues and for being constructive participants in the Delta conversation. CCWD has spent over \$1B over the past 20 years to build infrastructure to protect and improve our drinking water quality. Unfortunately the pressure on our assets to perform this critical function grows greater every day as Delta water quality continues to decline. CCWD frequently engages with a wide range of stakeholders in collaborative efforts to protect the Delta by participating in projects that protect Delta levees, enhance Delta ecosystem protection, improve Delta water supply operations, advance Delta science, and maintain Delta water quality.

For the past 30 years, Contra Costa Water District has worked with Delta counties and environmental groups, to prevent the export of toxic drainage from the San Luis Unit to the Delta. This includes opposition to building the San Luis Drain to the Delta as well as opposition to drainage discharges to the San Joaquin River and thus ultimately to the Delta. CCWD understands the need for drainage services for the San Luis Unit and fully supports sound in-valley drainage solutions, but we also seek to ensure that the actions of others will not harm us or our Delta neighbors. For instance, CCWD participated in the productive Grassland Bypass Use Agreements process in order to promote effective drainage management in the Northerly Area.

CCWD acknowledges the stated commitment of Westlands and the Northerly Area contractors to manage their toxic agricultural drainage within their own boundaries. An in-valley drainage solution would be in keeping with the 2007 Bureau of Reclamation Record of Decision on the San Luis Drainage Feature Re-Evaluation, and it is essential that drainage is not exported to the Delta. However, as they say, "the devil is in the details," and the details of the Westlands Settlement

Agreement and the Northerly Area Agreement are lacking. To ensure that the many beneficial uses of the Delta are not impacted, most important to CCWD being drinking water as a beneficial use, CCWD's Board of Directors have taken an Oppose Unless Amended position on the proposed legislation enacting these agreements with amendments required in three key areas.

First, the agreements both lack drainage management plans. This is despite the Obama administration letter to Senator Dianne Feinstein dated September 1, 2010, that identified as "key elements" to any drainage settlement "measurable environmental objectives, including water quality" and "specific enforceable performance measures." The Westlands Settlement states that Westlands must manage its drainage as a condition for receiving CVP water, but the Settlement does not identify how proper management will be determined. The enacting legislation, and the implementing agreements, need detailed drainage management plans specifying monitoring, reporting, and enforcement measures. The monitoring and reporting that already occurs under the Grassland Bypass Use Agreements can serve as a model for these requirements. And at a minimum the terms of the current Use Agreement, including the requirement to achieve zero discharge to the San Luis Drain by the end of 2019, need to be incorporated into the Northerly Area Agreement. The Department of Interior, Bureau of Reclamation has a responsibility in perpetuity under anti-degradation policies of the state to ensure that these agreements do not create significant impacts on the beneficial uses of the Delta. Drainage management plans need to be finalized and approved by the appropriate state and Federal agencies before the San Luis Unit contractors receive the benefits of these agreements. These plans should be overseen by the Environmental Protection Agency if Reclamation is unable to ensure that these agreements do not adversely impact other water users such as CCWD or the Delta ecosystem.

Second, the agreements call for inadequate amounts of land retirement. Land retirement has been acknowledged to be the best way to prevent drainage impacts but the settlement fails to secure a sufficient amount of acres to ensure Westland's fulfills its drainage control responsibilities. The 2007 ROD selected a final alternative with 194,000 acres of land retirement, which in itself was already less than the 308,000 acres of land retirement identified in the lowest net cost alternative recommended by the U.S. Geological Survey and the U.S. Fish and Wildlife Service. However, the Westlands Settlement only requires 100,000 acres of land retirement, and the Northerly Area Agreement has no land retirement requirement. Furthermore, the total contract amount of water given to San Luis Unit contractors through Central Valley Project contracts should be reduced proportional to the amount of land retired. Retiring drainage-impaired land not only reduces the amount of toxic drainage generated from the region but also reduces the irrigation demand of the region. Decreasing the demand for Delta exports reduces the burden on the overstressed Delta system, leading to a healthier ecosystem and a more reliable water supply for all beneficial uses of the Delta. The Westlands Settlement currently awards Westlands a permanent contract for their existing 1,193,000 acre-feet of water per contract year, which does not take into account land already retired or land that will be retired; this inflated total contract amount gives Westlands an unfair, disproportionately large base amount from which shortage allocations are calculated. Instead of reaffirming the San Luis Unit contractors' full contract supply and converting their existing contracts to permanent contracts, the agreements should promote water conservation and irrigation efficiency by retiring the water rights linked to the irrigation of retired lands.

Third, the agreements have potential to harm other CVP contractors. For 80 years, CCWD has relied on Central Valley Project water to meet most of our customer needs. CCWD signed a long-term 40-year municipal and industrial contract with the Central Valley Project in 2005. CCWD and other CVP contractors are already concerned over the decreasing reliability of CVP water supply in general. Replacing the San Luis Unit contractors' renewable contracts with permanent contracts as contemplated in the settlement without legally binding and enforceable provisions added to the contracts could harm the rest of the CVP's contractors by giving Westlands higher priority to limited water available to the entire CVP. The new rights awarded in the settlement to Westlands also violate the past practice of the Bureau of Reclamation recognizing "first in time, first in rights" priority, which means older CVP contractors like CCWD are potentially impacted in the form of lesser deliveries and/or contract quantities. Also concerning is the fact that legislative history contains references to San Luis Unit water as "surplus" water. Congress never intended San Luis users to be given priority over other CVP contractors, but priority is implied by granting the San Luis Unit users guaranteed permanent contracts. The basis for moving forward with San Luis Unit in the first place was that their needs would only be met after existing needs were met, which

include the needs of CCWD and other Delta beneficial uses. The March 18, 2016 memorandum from the Congressional Research Service to Congressman Jared Huffman regarding the Westlands Drainage Settlement describes several ways that CVP contractors would be harmed by the settlement. Specifically, in order to avoid adverse impacts to the water supply of other CVP contractors, the San Luis Unit contract totals need to be subject to review at regular intervals, particularly in the face of changes in hydrological conditions in California due to climate change and sea level rise or completion of the California WaterFix or other actions. Similarly, the settlement agreements' forgiveness of the San Luis Unit contractors' capital repayment debt must not hurt other CVP contractors by shifting recovery of CVP costs to us. The legislation must specifically address how the \$420M cost will be recovered in the Federal budget without shifting costs to other CVP contractors.

Thank you for this opportunity to testify on this topic of vital importance to CCWD.

Dr. FLEMING. Thank you, Mr. Brown.
Mr. Birmingham, you are recognized.

**STATEMENT OF TOM BIRMINGHAM, GENERAL MANAGER/
GENERAL COUNSEL, WESTLANDS WATER DISTRICT,
FRESNO, CALIFORNIA**

Mr. BIRMINGHAM. Thank you, Mr. Chairman, members of the committee. In my written testimony, and in the written testimony submitted by the Department of the Interior, there is a detailed description of the history of the litigation that has brought us to this point. I will not recount that litigation, but I would like to observe that this is a real problem, as made very evident by the photograph that was depicted during the opening statement by the Ranking Member.

This is a real problem that existed in the San Joaquin Valley and an environmental problem that has existed for more than 35 years. And it is a problem that will be resolved through this settlement and the legislation to authorize the settlement.

I understand that there are many who, at the mere mention of Westlands Water District, have their blood pressure raised. I have heard Members of Congress say, "If this legislation benefits Westlands,"—not H.R. 4366, but any legislation that benefits Westlands—"I am going to oppose it." But when the benefits to the United States derived from this legislation are objectively analyzed, I believe that a reasonable person would conclude that this is in the best interest of the Federal Government, it is in the best interest of the taxpayer, and it is in the interest of the people of the state of California.

Under this settlement, Westlands will assume responsibility for managing drain water within its boundaries. There are concerns about the potential that this water will be discharged to waters of the United States or into the Delta. The settlement does not permit that. The settlement is very clear. Water must be managed within our boundaries. And if we do not perform, the Federal Government has the ultimate hammer. Our water supply will be shut off.

I understand that this may not be the settlement that individual Members of Congress have negotiated, but it is the settlement that the Obama administration negotiated on behalf of the United States. And under the terms of the settlement, the Federal Government will be relieved of an obligation to spend in excess of \$3.5 billion under a court-mandatory injunction. They will be in-

demnified against any liability as it relates to their failure to provide drainage. The Federal Government will be indemnified against liability in existing takings litigation. Westlands will become a party to that litigation, and will compensate the landowners who have filed litigation against the government. Westlands will dismiss its contractual litigation.

This is pretty simple. We have been paying for drainage service for in excess of 35 years. We have not received the drainage service. Our breach of contract litigation will go away. But from Westlands perspective, perhaps the greatest benefit is that there will finally be a meaningful solution to the drainage problem. And that is critical if we are going to sustain irrigated agriculture on the west side of the San Joaquin Valley.

With that, Mr. Chairman, I would be delighted to answer your questions or questions of the members of the subcommittee.

[The prepared statement of Mr. Birmingham follows:]

PREPARED STATEMENT OF THOMAS BIRMINGHAM, GENERAL MANAGER/GENERAL COUNSEL, WESTLANDS WATER DISTRICT ON H.R. 4366 AND H.R. 5217

Mr. Chairman and members of the subcommittee, my name is Thomas Birmingham, and I am General Manager/General Counsel of the Westlands Water District. I appreciate the opportunity to testify today in support of H.R. 4366, the "San Luis Unit Drainage Resolution Act," which authorizes the implementation of the settlement agreement between the United States and Westlands Water District for the purpose of resolving litigation related to the Secretary of the Interior's obligation to provide drainage service to the San Luis Unit of the Central Valley Project.

WESTLANDS WATER DISTRICT

Westlands Water District (Westlands) is a public agency of the state of California, which was formed by an act of the State Legislature for the purpose of supplying irrigation water to land on the west side of the San Joaquin Valley. The District's principal office is in Fresno, California, and it consists of more than 600,000 acres of land in Fresno and Kings counties. The lands within Westlands are among the most productive agricultural lands in the world. Fruits and vegetables produced in Westlands grace dining tables across the United States. That tremendous productivity occurs through a combination of the area's climate and soil, the skill and diligence of area farmers, and water. Westlands provides most of the water used to irrigate these lands, water it receives under a contract with the Federal Bureau of Reclamation (Reclamation). Because of its role in providing essential irrigation water, Reclamation rightly deserves credit for helping to create what is now a highly valuable agricultural resource. In this respect, Federal reclamation policy has been a notable success.

For some lands within Westlands, as with lands elsewhere in the San Joaquin Valley, and across the United States, something more is required to keep the lands productive over the long term. Some lands require drainage. In the United States alone, 11 million of 44 million irrigated acres require drainage to remain productive. But disposing of drainage water can create its own set of concerns and issues, such as impacts to water quality. As a result of such concerns today there is no drainage of lands in Westlands, with the result that some lands in Westlands can no longer support irrigated crops. Without a solution, still more lands will be rendered infertile. With respect to drainage for these lands, Federal reclamation policy has been a notable failure.

HISTORY OF LITIGATION CONCERNING DRAINAGE SERVICE FOR THE SAN LUIS UNIT

An understanding of the importance of H.R. 4366 requires an understanding of the events that have brought us to this point. I am confident that the Members of Congress who approved the construction of the San Luis Unit of the Central Valley Project in 1960 would have been very surprised to learn that this subcommittee is considering legislation, 56 years later, to resolve litigation concerning the Secretary's duty to provide drainage to the San Luis Unit, as the 1960 legislation was intended to have resolved that issue.

In 1960, it was understood that the delivery of irrigation water to areas within the San Luis Unit would also require drainage. Studies of the proposed San Luis Unit confirmed the need for drainage. Lands in areas adjacent to the proposed San Luis Unit were experiencing drainage problems, and landowners in those adjacent areas expressed concerns that providing irrigation water to the San Luis Unit lands without drainage could exacerbate their drainage problem. Indeed, California's earliest water plans recognized that if water were exported from the Sacramento-San Joaquin Rivers Delta and used in the Central Valley a master drain would be needed. Accordingly, in section 1(a) on the San Luis Act, Congress required the Secretary to provide for a drain to the Delta in the event that the state of California did not provide a drainage system. (Act of June 3, 1960, Public Law 86-488, 74 Stat. 156.) In 1961, California informed the Secretary that it would not provide a master drain, and on January 9, 1962, the Secretary advised the Congress that he would make provision for the drain called for by the San Luis Act. Later, Reclamation entered contracts with Westlands (and other San Luis Unit Contractors) under which drainage service for lands within Westlands was contemplated.

There is a long trail of litigation over the Secretary's performance of these statutory and contractual duties.

That trail begins in 1963, when a group of districts now known as the San Joaquin River Exchange Contractors, which serve irrigation water to lands adjacent to the San Luis Unit, filed suit to compel the Secretary to provide for the drain before commencing construction of the San Luis Unit. The District Court denied an injunction, and dismissed the action, based on assurances by the United States that it would provide drainage to the San Luis Unit.

Construction of the San Luis Drain began in 1968, but in 1975 the Secretary halted construction with only 40 percent of the Drain completed, based on concerns expressed by various groups about effects of the discharge of drain water into the Delta. Without a terminus in the Delta, drainage water generated from the limited area then being drained was stored on an interim basis at Kesterson Reservoir. The drainage water contained selenium, a naturally occurring mineral that was leached from soils in Westlands served by the Drain. Selenium is an essential part of the human and animal diet, but at sufficiently high concentrations can cause adverse effects to human health, animal life and crops. Selenium was identified as the cause of deformities and mortality in waterfowl embryos at Kesterson Reservoir, and in 1985 the Secretary announced that Kesterson and the Drain would be closed. The Secretary failed to provide any alternative plan for providing drainage.

In 1988 and 1991, various landowners and water districts, including the Exchange Contractors, brought multiple actions against the Secretary to compel the Secretary to provide the drainage service required by the San Luis Act. (*See Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715 (E.D. Cal. 1993).) After the District Court ruled that the San Luis Act imposed a mandatory duty to provide drainage, the government argued that changes in law since the adoption of the San Luis Act made compliance impossible. After a 3-week trial, the District Court rejected the government's contentions. The government then appealed to the Ninth Circuit of Appeals. In the meantime, nothing was being done to provide Federal drainage service to Westlands.

In 2000, 40 years after passage of the San Luis Act, and 15 years after the Secretary essentially quit on drainage, the Ninth Circuit weighed in on the drainage issue. (*Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000).) The Ninth Circuit held that the Secretary has a mandatory duty to provide drainage service to the lands of the San Luis Unit, although the Secretary has discretion whether to provide drainage service by a drain to the Delta or by some other means. The Ninth Circuit said:

We agree with the district court that the Department of Interior must act to provide drainage service. The Bureau of Reclamation has studied the problem for over two decades. In the interim, lands within Westlands are subject to irreparable injury caused by agency action unlawfully withheld. Now the time has come for the Department of Interior and the Bureau of Reclamation to bring the past two decades of studies, and the 50 million dollars expended pursuing an "in valley" drainage solution, to bear in meeting its duty to provide drainage under the San Luis Act.

203 F.3d at 578.

In response to the mandatory injunction issued after the Court of Appeals decision, Reclamation began evaluating alternative means of providing drainage service to the San Luis Unit, culminating in the San Luis Unit Drainage Feature Re-evaluation Environmental Impact Statement. Thereafter, in 2007, Reclamation

signed a Record of Decision selecting a drainage plan and finding that the cost of providing drainage for lands served by the San Luis Unit would be approximately \$2.7 billion. Reclamation now estimates that those costs are approximately \$3.8 billion using 2015 cost indices. Reclamation began implementing the selected drainage plan in a portion of Westlands in 2010 on a court-ordered schedule.

In addition, the United States settled litigation brought by individual landowners regarding some 37,000 acres within Westlands damaged by a lack of drainage. Under that settlement, the United States paid approximately \$110 million in damages. However, the claims of other landowners and Westlands with respect to other lands damaged by the lack of drainage remain unresolved. In 2011, those other landowners in Westlands filed a takings claim against the United States, alleging that failure to provide drainage service has caused a physical taking of their lands without just compensation, in violation of the Fifth Amendment. The Court of Federal Claims denied the United States' motion to dismiss the complaint, and while the complaint does not specify a dollar amount for damages, the government estimates that Federal liability for just compensation could be over \$2 billion.

In January 2012, Westlands filed a breach of contract claim against the United States, alleging that the Secretary's failure to provide drainage service to Westlands constituted a breach of Westlands' 1963 Water Service and 1965 Repayment contracts (including the interim renewal of those contracts). That case is currently pending.

In the context of this history, it should be evident to any objective person as to why the settlement authorized by H.R. 4366 is in the best interests of the United States, Westlands, and Federal taxpayers. Under the settlement: (1) the Secretary will be relieved of an obligation, the cost of which, is in excess of \$3.5 billion; (2) the United States will be indemnified against liability that the government has estimated could be in excess of \$2 billion; and, (3) Westlands will manage drain water within its boundaries, addressing a vexing environmental problem.

TERMS OF THE SETTLEMENT

Under the settlement authorized by H.R. 4366, the Secretary would be relieved from all drainage obligations imposed by the San Luis Act, including implementation of the 2007 Record of Decision, which Reclamation estimates will cost approximately \$3.8 billion. Westlands will dismiss, with prejudice, the pending breach of contract litigation and will join the United States in a petition to vacate the District Court judgment imposing a mandatory injunction ordering implementation of drainage service. Westlands will provide for the release, waiver and abandonment of all past, present and future claims arising from the government's failure to provide drainage service under the San Luis Act, including those by individual landowners within Westlands' service area, and would further indemnify the United States for any and all claims relating to the provision of drainage service or lack thereof within the Westlands service area. Westlands will also seek to intervene in the pending landowner litigation for purposes of settling the case and will pay compensation to individual landowners.

The settlement also provides that Westlands will become legally responsible for the management of drainage water within its boundaries, in accordance with Federal and California law. How Westlands will manage drainage water depends on the varying needs within the drainage-impaired areas, and will evolve as conditions change. It will also depend upon ongoing monitoring and regulation of groundwater under the Long Term Irrigated Lands Regulatory Program being administered by the California Central Valley Regional Water Quality Control Board under the Porter-Cologne Water Quality Control Act. California Water Code sections 13000, et seq. Measures that will be used by Westlands include elements identified in Reclamation's drainage plan, such as land retirement, source control through more efficient irrigation practices, and collection and reuse of shallow groundwater.

In exchange for agreeing to undertake responsibility to manage drain water within its boundaries, agreeing to dismiss its pending breach of contract claim against the United States, agreeing to compensate landowners in the pending Federal Claims Court litigation, and agreeing to indemnify the United States against future claims arising out of the Secretary's failure to provide drainage service, Westlands will be relieved of the obligation to pay its current, unpaid capitalized construction costs for the Central Valley Project. Reclamation currently estimates that the present value of these unpaid costs is approximately \$300 million. However, under the settlement, Westlands will still be responsible for the payment of operations and maintenance costs of the Project and the payment of restoration fund charges pursuant to the Central Valley Project Improvement Act. Moreover, Westlands will still be responsible for future Project construction charges. The Secretary will convert

Westlands' current 9(e) water service contract to a 9(d) repayment contract consistent with existing terms and conditions. As a "paid out" contractor, the benefit of this conversion is permanent right to a stated share of Central Valley Project water. However, the terms and conditions of the contract, including the "shortage provision" that immunizes the United States from liability if shortages are caused by restrictions on operations of the Project imposed by Federal and applicable state law, will otherwise be the same as in the current 9(e) contract. Moreover, a new condition will be imposed in the 9(d) repayment contract: under the settlement, the United States' obligation to provide water to Westlands will be conditioned on Westlands' fulfillment of its obligations to manage drainage water within its service area. In other words, if Westlands does not fulfill its obligation to manage drainage water in a manner consistent with state and Federal law, its Central Valley Project water supply will be cut off.

Another significant term of the settlement related to the 9(d) repayment contract is that it will cap deliveries to Westlands at 75 percent of its existing contract quantity, 1.193 million acre-feet. Any water allocated in excess of this 75 percent cap, that otherwise would have been delivered to Westlands, will instead be available to the United States for other authorized Project purposes. In a year like 2011, when the allocation to south-of-Delta agricultural contractors was 80 percent, 59,650 acre-feet of water would have been available for other purposes, such as level 4 refuge supplies. Assuming a modest cost of \$200 per acre-foot, if the Secretary were to purchase this quantity of water in the transfer market, the water would have a value of \$11.9 million.

The settlement also obligates Westlands to permanently retire from irrigated agricultural production not less than 100,000 acres of lands within its boundaries. This total includes lands previously retired by Westlands, approximately 36,500 acres, and lands previously acquired by Westlands and fallowed temporarily, approximately 53,500 acres. After retirement, these lands may be utilized only for: (1) management of drain water, including irrigation of reuse areas; (2) renewable energy projects; (3) upland habitat restoration projects; or (4) other uses subject to the consent of the United States.

SIMILARITIES TO SAN JOAQUIN RIVER SETTLEMENT

There exists recent precedent for the settlement between the United States and Westlands authorized by H.R. 4366. In 2009, Congress enacted the San Joaquin River Restoration Settlement Act, Title X of Public Law 111-11, which authorized the implementation of a settlement to resolve decades-long litigation concerning the Secretary's obligation to make releases from the Millerton Reservoir, a facility of the Central Valley Project, to comply with the requirements of California law.

Like the settlement between the United States and Westlands intended to resolve decades-long litigation involving the Secretary's failure to comply with the law mandating drainage service to the San Luis Unit, the litigation related to the San Joaquin River involved environmental impacts resulting from the Secretary's failure to comply with the law. Both settlements provide for the conversion of Central Valley Project 9(e) water service contracts to 9(d) repayment contracts. Both settlements provide for the use of the contractors' capital repayment obligations as a source of funds to implement the settlements. The only meaningful difference between the terms of the two settlements is that under the San Joaquin River Settlement, the Federal Government remains responsible for compliance with the law and funding those measures required to implement the settlement. Under the drainage settlement, the Federal Government is relieved from responsibility for compliance with the law, and Westlands, at its own cost, will undertake that responsibility.

I am aware that the mere mention of Westlands Water District raises the blood pressure of many environmentalists and some Members of Congress. Therefore, the reaction by some people that the settlement is a "sweetheart deal" for Westlands is not surprising, but is far from the truth. When the settlement is analyzed objectively, the benefits to the Federal Government and Federal taxpayers become readily apparent. The Secretary will not be faced with a mandatory injunction, compliance with which will cost an estimated \$3.8 billion. Westlands will become responsible for drainage, and if Westlands does not perform, its Central Valley Project water supply will be terminated. Westlands will retire permanently 100,000 acres, and its maximum Central Valley Project water supply will be reduced by 25 percent. Westlands will compensate individual landowners who have sued the Federal Government, a Federal liability that the government estimates could exceed \$2 billion if the litigation were not settled.

Without question, Westlands will also benefit from the settlement. Westlands will be relieved of its existing capital repayment obligation, which the government estimates to have a present value of approximately \$300 million. But money that Westlands otherwise would have paid the United States absent the settlement, will be used to manage drainage water pursuant to the settlement. This cost will greatly exceed \$300 million. Westlands will receive a permanent water supply contract, but this is not an anomaly under Federal Reclamation law. Across the West, when a contractor is “paid out,” the contractor receives a permanent right to a stated share of a project’s water. Moreover, the conversion of Westlands contract to a 9(d) repayment contract will provide certainty that is critical to Westlands’ ability to expend the hundreds-of-millions of dollars required to implement the settlement. But among the most significant benefits farmers in Westlands will receive is that, after more than five decades, there will finally be a meaningful solution to the drainage problem.

I would be happy to answer any questions the Members have.

QUESTIONS SUBMITTED FOR THE RECORD BY REP. HUFFMAN TO MR. TOM BIRMINGHAM, GENERAL MANAGER, WESTLANDS WATER DISTRICT

Mr. Birmingham did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Question 1. If Congress approves the drainage settlement agreement with the Westlands Water District (Westlands), how specifically will Westlands provide drainage? Please provide any preliminary drainage management plans already developed by Westlands, including any cost estimates associated with such plans. If Westlands has not yet developed a specific drainage management plan, by when will Westlands complete a drainage management plan?

Question 2. Does the Westlands Water District anticipate any future financial commitments—including potential financial commitments associated with the proposed California WaterFix—that would undermine Westlands’ ability to finance drainage services?

Dr. FLEMING. Thank you, Mr. Birmingham. And indeed, I am sure we do have a lot of questions today. As a result, I now recognize myself for 5 minutes for questions. My first question is for Mr. Bezdek.

In an October 2015 document prepared by the Bureau of Reclamation regarding the drainage settlement, it states that there is “the risk that Reclamation could be ordered by the court to provide this drainage service, notwithstanding the congressionally authorized construction ceiling under the San Luis Act of 1960.”

My question for you, sir, is do you agree with Reclamation that such a court order is a possible risk?

Mr. BEZDEK. Mr. Chairman, we do believe that there is risk associated with this court order, having already ordered that we have an absolute obligation to provide drainage, that it could continue to order us to provide drainage, even once the authorized ceiling has been reached. We believe that that is a significant risk, and it is something that was one of the drivers for this settlement.

Dr. FLEMING. OK, thank you. If a court would issue such an order, wouldn’t that be disruptive to Reclamation’s operations and other budget priorities?

Mr. BEZDEK. Let me answer that by giving you an example, sir. In 2014, we had budgeted for \$29 million to be allocated toward providing drainage. We had forwarded a reprogramming letter to Congress outlining that, because of the settlement and because of

the stay issued by the court in light of the settlement, that we were able to take that \$29 million and spend it on a host of other things, activities to improve water supply, Endangered Species Act compliance, or other types of environmental restoration activities.

So, just in a very short period of time we have already seen the benefits of the settlement. Our concern is that, given the control schedule issued by the court, and the amounts that the court is expecting us to expend if we were back in front of it, that it would definitely jeopardize our ability to meet a lot of other priorities in California.

Dr. FLEMING. OK, thank you. Now, this question is to both of you, Mr. Bezdek and Mr. Birmingham.

Mr. Ellis stated in his testimony that his organization is opposed to the drainage settlement because "we just don't think this is the best or even a good deal for taxpayers." Do you agree with that?

Mr. BEZDEK. We believe that this is a very good deal for taxpayers. Quite simply, first and foremost, there is the 2000 Order from the Ninth Circuit directing us to provide drainage service. It is absolute.

Second, since 2010, there have been other intervening events that have occurred. Westlands has filed a litigation against us for breach of contract. In addition, individual landowners within the Westlands District have filed for takings in the court of claims. We believe that there is potential exposure of up to 2 billion. From that standpoint alone, we believe that this is very good. In addition to resolving those cases, Westlands is also agreeing to step in and indemnify us for any future damages, as it regards drainage.

So, from our perspective, having this obligation, having the court direct us to implement drainage, we believe that this is a very good deal for the United States, and it will free up our budget to accomplish a lot of other very important things.

Dr. FLEMING. OK. How about Mr. Birmingham? What do you think?

Mr. BIRMINGHAM. Mr. Chairman, it is Westlands' view that this is a very good deal for the United States.

This settlement agreement has been referred to as a bailout. The real question is who is bailing out whom. In this context, Westlands is bailing out the United States. Even if the law were to be changed, and the obligation to deliver drainage to the San Luis Unit were to go away, there is still liability, which the Department of Justice has estimated could be in excess of \$2 billion under a takings claim. That does not go away with the change in the law. And Westlands is agreeing to settle the litigation with those parties; that is a significant savings.

Even if the government were to implement drainage, as has been suggested, we would repay that obligation over a 50-year period, interest free. That has a present value, according to the Department of the Interior, of approximately \$1.2 billion that the Federal Government will save, just based in terms of the present value of money. And there are other benefits that the United States will receive. We are reducing our water supply by 25 percent. That has value to the United States.

So, in response to your question, I disagree with the observation that this is not a good deal, the best deal for the United States.

There may be better deals, but this is a very good deal for the United States.

Dr. FLEMING. OK. Thank you, gentlemen.

Mr. Huffman is recognized for 5 minutes.

Mr. HUFFMAN. Thank you, Mr. Chairman. I do have some questions. Before I get to them I just want to say we continue to hear, I believe, too many red herrings and straw men on this subject. I think if people are going to come in here and say they have heard Members of Congress say certain things, that if something helps Westlands than they are opposed, they had better be ready to name names, because I have never said that, and I have never heard a Member of Congress say that, and I think we are entitled to know who the heck you are talking about, or whether it is a complete fiction, which is my supposition.

Similarly, when folks say that Members of Congress want to see the west side of the valley blow away and dry up and stop providing food, that is nonsense. I don't know anyone who subscribes to that view. So, let's come back to the subject matter at hand.

And Mr. Bezdek, I think you have drawn the short straw from the Department of the Interior to come here and defend these particular settlements, one of which nobody has even seen. For the first time last night in your written testimony, we learned that there is apparently a brand new pending Inspector General's investigation underway. That was the first I had heard of it. To my knowledge, the first anyone has heard of it. And now we learn at the last minute that the witness that we had expected to have here from these Northerly Districts is not showing up.

Can you just confirm for the record that there is a pending investigation?

Mr. BEZDEK. Yes, sir. There is a pending investigation by the Department of the Interior's Office of the Inspector General.

Mr. HUFFMAN. Mr. Bezdek, going back over 8 years, the Interior Department has always outlined the importance of retiring between 194,000 and 305,000 acres of land as part of a solution to the drainage problem on the west side. Yet, in this agreement, you provide for a mere 100,000 acres of land retirement, and almost all of that land has already been retired. So, you are basically proposing to re-retire it, or to take credit for what has already happened on the ground.

Does Interior now believe that those other hundreds of thousands of acres are suddenly OK to irrigate with imported water? And what is Interior's plan to make sure this does not cause a new Kesterson-type disaster? Who is going to make sure that does not happen?

Mr. BEZDEK. The initial answer to your question, Congressman, is that our view is that the settlement was designed to provide great flexibility for Westlands to determine how best to implement drainage. Our number-one policy goal was for the Department to get out of the drainage business. So, the 100,000 acre-foot is a floor, it is not a ceiling. The settlement was set up precisely to allow for great flexibility.

It is my anticipation that it will go well above 100,000, but that is up to Westlands to determine how to implement it. But one of

the cruxes of this settlement was to provide for flexibility in achieving the ultimate requirements to meet the drainage obligation.

Mr. HUFFMAN. I think I hear you say that the Westlands Water District is going to be responsible for making sure that another Kesterson-like incident does not happen. Is that fair to say?

Mr. BEZDEK. They are going to take on the obligation to provide drainage. That is correct. And—

Mr. HUFFMAN. So, you are telling Congress and the people of California that we should entrust the Enron accounting team with taking care of that particular environmental scenario.

I want to ask you now about liability. We heard about indemnification. However, what was not mentioned and what I want to specifically ask you about is that indemnification provision in the agreement, to my knowledge, applies only from claims coming from within the San Luis Unit. Isn't that correct?

Mr. BEZDEK. Yes, sir. That is correct.

Mr. HUFFMAN. All right. So just outside the San Luis Unit you have the San Joaquin River exchange contractors who have maintained in the past that they are impacted by drainage from the west side. Does this agreement protect the Department of the Interior and the taxpayers of the United States against claims from the San Joaquin River exchange contractors and others who may be impacted by the drainage problem outside of the San Luis Unit?

Mr. BEZDEK. My understanding, Congressman, is there is a Ninth Circuit precedent that acknowledges that the obligation to provide drainage flows only to the land served by the San Luis Unit, and that there is no obligation to provide drainage to those individuals with lands that are not served by the San Joaquin—

Mr. HUFFMAN. Does the agreement protect the taxpayers in the Department from claims outside the San Luis Unit?

Mr. BEZDEK. Does the agreement expressly state that? No, sir. Do we believe that there is no legal obligation to provide drainage? We believe there is no legal obligation to provide drainage to those lands outside of the unit.

Mr. HUFFMAN. All right. Do you intend to do any NEPA analysis of these proposed agreements that have such profound potential impacts on other water users and the environment?

Mr. BEZDEK. We do agree that NEPA should be done on the implementation of both agreements. I believe the legislation acknowledges that the implementation will be subject to NEPA and other environmental laws.

Mr. HUFFMAN. Well, Mr. Costa's legislation says that they will be implemented notwithstanding any other law. Doesn't that include NEPA, "any other law"? Wouldn't that appear to waive NEPA?

Mr. BEZDEK. Our position, sir, is that these agreements will be implemented, and they will be subject to NEPA.

Mr. HUFFMAN. Far more questions than we have time for. I yield back.

Dr. FLEMING. The gentleman yields. Chairman Bishop is recognized.

The CHAIRMAN. Thank you, Mr. Fleming. I noticed all the Californians are here. And if Californians are all here, we must be talking about water. Right?

[Laughter.]

The CHAIRMAN. Back in February of 2015, I sent a letter to the Attorney General, as well as the Secretary of the Interior, which outlined a process. And we recognized in that letter that settlements are basically preferable to litigation, and that it usually helps the taxpayer because it takes away burdensome liabilities.

So, the bills that are here before us attempt to do just that. So Valadao and Costa, you relieve the Federal Government of building, what, a \$4 billion drain, even though the law and the courts say they have to? But you can change that and have a net savings to the American taxpayer.

Similarly, the Blackfeet legislation would save, what, around \$200 million to the taxpayer if it were implemented, even though it is not a cost benefit assessment that has been done by OMB?

I appreciate the work of the sponsors, and those in the community that are working on both these pieces of legislation. I think we have created a process that is moving forward. But—here comes the but—there is still work that needs to be done because, until OMB actually responds to the letter that we sent back in 2015 and gives their definitive statement, you are still asking us to be an arbitrator on the funding of this bill.

I realize OMB signed off on the testimony that you gave, but their testimony is sending us mixed signals because the other week they said they are still assessing the cost of the bills that are using this criteria. That has to be part of the process. That was part of the February 2015 letter, and it has not yet arrived.

So, Mr. Bezdek, let me ask you—and Ms. Belin, if you would like to—when can we get a definitive written answer from OMB so we can continue on with this timeline? And let me ask you specifically. Can we get that within 2 weeks?

Mr. BEZDEK. Mr. Chairman, I am unable to give you an exact date by which OMB will respond. What I can tell you is that the Department believes the criteria and procedures have been met. This is a new process in terms of following the protocols laid out in your letter. We are working with OMB to get the net information, but I am unable to sit here and give you a precise date by which they will respond.

The CHAIRMAN. Well, that gives us problems, since we are planning on moving forward with these bills. I appreciate the position of the Department, but they are wrong. Until OMB fulfills that portion of the letter, those criteria have not been met. It has to be there.

So, I am going to give you another chance. When can we expect OMB to fulfill the Administration's responsibilities here?

Mr. BEZDEK. Mr. Chairman, all I can tell you is that we are working with them. I was on the phone with them last evening. We are exchanging information. It is difficult for me to sit here and give you a date. All I can tell you is we are working very hard to provide that information.

The CHAIRMAN. That does not help. I appreciate the situation you find yourself in, but it simply does not help. That is part of the criteria. That has to be there. And these pieces of legislation are being hung up because OMB still is giving mixed signals. I mean, they may have signed off on this document, but they have to give a

written cost benefit assessment. That has to be part of the process. And we are not going to be able to move forward until OMB actually does their job.

So, if you would be kind enough to go back there and tell them, "Damn it, do it, we cannot move forward with these bills until that has taken place, do it." And I hope to do that.

I have 1 minute left. Let me ask you, because one of these does deal with a drainage settlement that supposedly helps the Navy. Can you tell me how the Navy is involved with that settlement?

Mr. BEZDEK. Yes, sir. There is a naval air station that is within this area that has issues with birds striking aircraft. So they need to have irrigation water to keep the weeds down, to keep the rodents down, to keep the birds out. This deal will solidify an agreement whereby water will be provided to them from the CVP, and it will be wheeled by Westlands. So, this is a benefit to the Navy.

The CHAIRMAN. Well, good. I hope that works out. Otherwise, we have an NDAA amendment coming up one more time.

Once again, OMB needs to do their job. We have to have that assessment. That is essential. It is not done, and we cannot move forward until it happens. If you would communicate that, I would be greatly appreciative.

Mr. BEZDEK. Yes, sir.

The CHAIRMAN. Thank you. I yield back.

Dr. FLEMING. The Chairman yields back. Mrs. Napolitano is recognized.

Mrs. NAPOLITANO. Thank you, Mr. Chairman. I agree with my colleague, Mr. Huffman, on many of the points that he has made.

But Mr. Bezdek, does the Department of the Interior have any concerns over whether Westlands will be able to carry out the financial obligations on this settlement to construct the drainage that properly protects the drinking water and quality and environment without misleading the Federal Government and local residents? This is the people's house, we are supposed to be protecting them.

Mr. BEZDEK. Yes, ma'am. We do believe that Westlands has the capability and ability to do this. We also have worded the settlement agreement to provide that if drainage is not provided, that we maintain the right to have the ultimate drainage solution, and that is to cut off water deliveries.

Mrs. NAPOLITANO. Well, if there is no water?

Mr. BEZDEK. Excuse me, ma'am?

Mrs. NAPOLITANO. Well, what if there is no water to be able to—I am sorry, I am thinking about another area.

Wasn't there an effort to begin cleanup of that contamination at one end?

Mr. BEZDEK. Yes. There has been work that has been undertaken by the Northerly Districts to implement a portion of the west side regional drainage plan. In addition to that, there has been work on—

Mrs. NAPOLITANO. And what results have there been from that cleanup?

Mr. BEZDEK. Those plans are not finished. They are due to be finished in 2020. So, the results are not complete yet.

Mrs. NAPOLITANO. Are there any measurements in the settlement that ensure that Westlands would carry out the financial obligations?

Mr. BEZDEK. In terms of a metric as to carrying out—no, ma'am. The agreement just basically says if Westlands does not provide drainage, we maintain the right to withhold deliveries. We structured the agreement specifically to provide Westlands flexibility. I know there is a lot of concern about whether drainage will be done. Our position is whether it was Reclamation or Westlands, both of which are going to be accountable to the State Water Resources Control Board for implementing a drainage solution.

So, we feel comfortable that Westlands has the capability, and will carry this out.

Mrs. NAPOLITANO. I also have concerns over the entities receiving Federal land and the facilities. And then possibly selling at a later date at a profit at the expense of the U.S. taxpayers.

I yield to Mr. Huffman. He had additional questions.

Mr. HUFFMAN. I thank the gentlelady. I want to ask Mr. Ellis from Taxpayers for Common Sense about a point you made. You took issue with the Department's economic analysis when it was justifying this settlement as a good deal for taxpayers, because I think I heard you say they are selectively invoking current law.

On the one hand, they look at the Reclamation Act's very forgiving 40 year, 0 interest repayment terms, and they say, "Look how much that would cost the taxpayers if we advanced money for a drainage solution." On the other hand, they ignore the fact that the Federal liability for a drainage solution under current law is capped at \$513 million.

So, really, if we are looking fairly at current law, all of these projections about multi-billion dollar liabilities are completely contravening current law. Isn't that correct?

Mr. ELLIS. Yes, sir, Congressman Huffman. They did a net present value analysis, which is the appropriate analysis to do, discounting future dollars, bringing it all into 2015. But they did assume all of the current law provisions, which means that the last dollar that would be repaid would be in 2070, which—I think on the face of it, and especially in this day and age where you have a water district that claims that it produces \$1 billion in food and fiber every year, that they would get a no-interest loan from taxpayers for 4 years does not make a lot of sense.

And then also, yes, this legislation is making law, and this is an area that we have had concern for years about, the pricing of water, and how this is structured, and we are basing it all on a 1902 Reclamation Act.

Mr. HUFFMAN. All right. Then, Mr. Brown, you talked about the issue of Westlands, which is the most junior contractor in the system, being elevated in priority by virtue of this new permanent water contract they would be getting. Explain what that means to a senior water rights holder like Contra Costa County, which needs that water for municipal purposes.

Mr. BROWN. Certainly. When it comes to allocating the limited supplies that the Bureau has, there is a review of the different priorities. And this has kind of been a long-standing issue. In fact, Mr. Birmingham was an attorney against the Bureau back in the early

1990s, when Judge Wainger made the call that there are priorities, even within the CVP. It is within that basis that the San Luis Unit is essentially developed for surplus water, and that is water that is only available after all the other needs of the environment and the other water users have been met.

So, the concern we have is that if somehow this agreement puts in place a new priority in the system, that somehow we have now gone down in rank, and that concerns us greatly.

Dr. FLEMING. OK. Mr. McClintock is recognized.

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

Mr. Birmingham, if the settlement is not approved, what is the next legal step for Westlands?

Mr. BIRMINGHAM. If the settlement is not approved, and the Department of the Interior or the Secretary fails to comply with the court-ordered mandate, the next legal step would be to ask the court to hold the Secretary in contempt.

Mr. MCCLINTOCK. And the cost of judgments, I see here on a balance sheet provided by the Bureau of Reclamation, runs from a minimum of \$1.3 billion to as much as \$3.3 billion. Mr. Bezdek, is that correct?

Mr. BEZDEK. Sir, the only approved drainage plan comes out of a 2006 EIS with a cost of roughly \$3.8 billion escalated to today's dollars.

Mr. MCCLINTOCK. So, the liability to the taxpayers would be \$3.8 billion?

Mr. BEZDEK. That is correct, sir.

Mr. MCCLINTOCK. And the cost to taxpayers of this settlement is estimated at what?

Mr. BEZDEK. The cost to the taxpayers is the debt forgiveness on Westlands' capital obligations, which has been presently valued at roughly \$295 million.

Mr. MCCLINTOCK. And I see a total cost here on your assessment of \$331 million. So we are in the ballpark, then, roughly \$330 million.

Mr. BEZDEK. Yes, sir.

Mr. MCCLINTOCK. So, for \$330 million of cost we are relieving ourselves of \$3.8 billion of costs?

Mr. BEZDEK. That is how we see it.

Mr. MCCLINTOCK. I am not entirely clear why that would be such a bad deal for taxpayers, Mr. Ellis. I realize you are dealing in a realm of absolutes, but we have these judgments against us. This settlement bill would not be here if the Federal Government actually thought it would prevail. Why would you throw out \$3.8 billion of savings for \$300 million of cost?

Mr. ELLIS. I wouldn't, if I thought that those were actually accurate numbers. And again, it is—Congressman McClintock, you know, we have worked together on a lot of different things, Taxpayers for Common Sense and you, on various amendments on the Floor, and in this case—

Mr. MCCLINTOCK. I know we have, but unfortunately you deal in absolutes, and we have to deal in realities. And the reality is we are looking at \$3.8 billion in cost to be judged against the taxpayers that we can relieve ourselves of right now for about \$330 million.

Mr. ELLIS. Yes, sir. But the thing is that they are assuming that all of the current law—which means that they are assuming that basically, even though Westlands has to repay all of the costs for building the drain, that that is discounted over a 40-year period that does not start until 2030 on a no-interest loan.

So, the reason why the return is so much lower is because we are moving it all into 2015 dollars. My question then again, Congressman, is why is the law setting up the 40-year no-interest loan?

Mr. MCCLINTOCK. Because, with all due respect, we are looking at a more than 10-to-1 savings to cost on this.

Mr. Birmingham, I understand why this is a good deal for the government. I am not entirely clear why it is a good deal for you.

Mr. BIRMINGHAM. Well, I appreciate that, Mr. McClintock, and there are many people who have asked the same questions. Why would Westlands agree to this? But I would like to address, if I may just take a moment of your time, a number of the issues that have been raised.

The new priority that Westlands is going to get with this settlement is very specific. Westlands doesn't get a new priority. We get a 9(d) contract, but that is just like the 9(d) contract that the Friant contractors have. Last year, Westlands had a zero allocation, the 9(d) contractors in Friant had a zero allocation. The year before that Westlands had zero, Friant had zero. These contracts—and the agreement is very specific—do not give Westlands any priority.

But going back to the question of why would Westlands do this, we need to solve this problem. It has been a problem that has festered for more than 35 years. And we see this as a way to ultimately solve the problem. We will have to comply with state law. As Mr. Bezdek said, we are going to have to comply with the requirements of the California Regional Water Quality Control Board that is now beginning to implement a long-term irrigated lands program that will require monitoring and will ensure that water quality is not degraded.

And there are benefits to Westlands as a result of this, just like any compromise. We—

Mr. MCCLINTOCK. Just so that I am clear on this, we are at the end of the litigation process. You are now in the process of enforcing the court's decision, correct?

Mr. BIRMINGHAM. We were approached by the Obama administration approximately 3 years ago, and asked, "Would you consider trying to negotiate a settlement," because they did not see a means forward of complying with the mandatory injunction.

Mr. MCCLINTOCK. Right.

Mr. BIRMINGHAM. So, we sat down with the Obama administration to try to settle this litigation, and I think that we have come to a settlement that is fair to the government and it is fair to Westlands. So, we have not been in enforcement over the course of the term we have been trying to settle this case.

Dr. FLEMING. OK. Mr. Costa is recognized for 5 minutes.

Mr. COSTA. Thank you very much, Mr. Chairman.

Mr. Bezdek, there has been an issue raised that I think needs to clearly be resolved by the Inspector General's investigation. To

your knowledge, does this have anything to do with the Westlands settlement agreement?

Mr. BEZDEK. No, sir, it does not.

Mr. COSTA. All right, good. My understanding is the cost of providing drainage service, under your testimony, would be significant if we do not implement this proposal. Some estimate \$80 million a year. Do you agree with that number?

Mr. BEZDEK. Yes, sir. The court-ordered control schedule actually has \$80 million as a figure in one of the out-years.

Mr. COSTA. So, to our friends with the Taxpayers, if we do nothing, this is an \$80 million obligation that the Department of the Interior has.

Now, your budget for the Bureau of Reclamation is, what, approximately \$200 million annually?

Mr. BEZDEK. The region, probably a little bit more than that. But that is in the ballpark.

Mr. COSTA. So, \$80 million would have to be absorbed out of that \$200 million, would it not?

Mr. BEZDEK. Yes, sir.

Mr. COSTA. That would be significant. That would impact a whole host of issues, as you noted in your testimony, from protection of endangered species law, to a host of other issues that you are dealing with in the region. And it would also, I suspect, impact priorities for the San Joaquin River restoration, in terms of its schedule to be maintained. Is that correct?

Mr. BEZDEK. Yes, sir, it would. It would be a major drain on our budget, period.

Mr. COSTA. Mr. Brown, I appreciate your testimony. You indicated about the concerns that Contra Costa Water District has, and I appreciate that. Is it true that you have a discharge permit?

Mr. BROWN. We are not a discharger, no.

Mr. COSTA. You don't discharge into the water?

Mr. BROWN. No.

Mr. COSTA. The Delta?

Mr. BROWN. No, sir.

Mr. COSTA. OK. But you are concerned about discharges, right?

Mr. BROWN. Absolutely.

Mr. COSTA. And this settlement, if enacted, eliminates discharges. Would you not agree that is the purpose, in part, of this settlement agreement?

Mr. BROWN. We are not confident that that will occur.

Mr. COSTA. Even though, in face of the issue that if they don't comply they don't get water? You don't think that is enough of a motivational factor?

Mr. BROWN. No, I don't.

Mr. COSTA. Why?

Mr. BROWN. Because there is no specificity to what compliance means. There are no requirements for reporting—

Mr. COSTA. No, no, no.

Mr. BROWN [continuing]. There are no requirements for monitoring—

Mr. COSTA. Hold on a second, Mr. Brown. Let me tell you—

Mr. BROWN [continuing]. And there is no enforcement action by anybody.

Mr. COSTA [continuing]. Something about what is happening in the Northern Districts. In the Northern Districts, where we have implemented a regional plan, they are subject to both state and Federal environmental law. Do you not agree?

Mr. BROWN. I agree, and I have the actual drainage requirements that they have here that are specifying all the monitoring, measuring, and reporting.

Mr. COSTA. I think it is important for people to note here, Mr. Brown, that 80 percent of the salts and 90 percent of the selenium have been reduced in the Northern Districts. Do you agree with that number, Mr. Brown?

Mr. BROWN. I don't know if those numbers are correct, but I agree that there has been a significant reduction in the salts and toxics, yes.

Mr. COSTA. And the selenium.

Mr. BROWN. And there is a goal to get to a zero discharge by 2019.

Mr. COSTA. And this is an effort that has been going on—for the other Members—with the University of California Los Angeles that has a facility there, there is a reverse osmosis facility that is going there. There has been a great deal of effort that has taken place between the Northern Districts, Westlands, to perfect the agreement, because they know that they have to eliminate discharges. The reality is this has been an issue, as has been stated by Mr. Birmingham, for 35 years that they have had to contend with.

I was in Los Banos when Mr. Halson raised the issue that there would no longer be drainage provided at the San Luis Unit that was a part of the original Act. That changed the whole world; and so, as a result of that decision, we are now dealing with the issues that have come before us.

Is this solution going to be satisfactory to everyone in this committee? Of course not. Was the solution for the San Joaquin River Settlement Agreement satisfactory to everyone in this committee? Of course not. Are there still challenges with implementation of the San Joaquin River Settlement Agreement that involved climate change, involved land subsidence, and involved costs? Absolutely.

But if we are to do nothing, that does not provide any assurance to the folks in Contra Costa or to the Delta who are discharging, and some who do have permits to discharge into the Delta. Would you not agree, Mr. Brown, that a solution ultimately needs to occur?

Mr. BROWN. An in-valley drainage solution with drainage management specifics of monitoring—

Mr. COSTA. Right. Where you and I disagree—

Mr. BROWN [continuing]. Reporting, and enforcement is an important—

Mr. COSTA [continuing]. Is I believe this is contained in the settlement agreement and you do not believe it is contained in the settlement agreement.

We can agree to disagree, but I believe the facts speak for themselves. I believe you would not have this bipartisan agreement before us that the Obama administration has negotiated if that were not the case.

Thank you. My time has expired.

Dr. FLEMING. Mr. LaMalfa is recognized.

Mr. LAMALFA. Thank you, Mr. Chairman.

Mr. Birmingham, do you wish to follow up on what was a contention made with the short amount of time on shifting of priority as regards to your district versus—Contra Costa was brought up. Do you wish to elaborate on that?

Mr. BIRMINGHAM. Yes, Mr. LaMalfa, thank you. Throughout the negotiations, the concern that other contractors may fear that this would give Westlands some kind of priority that would reduce their water supply was paramount in the minds of all of the parties negotiating.

The settlement agreement is very specific. The legislation that would authorize the settlement agreement is very specific. And, in fact, the legislation was amended at the request of several water agencies to ensure that this agreement cannot be implemented in a way that would reduce their water supply, affect their water supply, or increase their costs.

As a consequence, we have other districts, like the Tehama-Colusa Canal Authority and the Friant water contractors, who have expressed support for this legislation to authorize the implementation of the settlement because both are clear. We cannot implement this in a way that would affect their water supply or impose costs on them.

Mr. LAMALFA. Certainly. OK. What is your level of confidence in the ability of your district being able to fulfill the obligations of the settlement versus if the Federal Government was to still be in charge of getting this drainage done. I mean yours versus theirs. Timely or cost-wise.

Mr. BIRMINGHAM. I have a lot more confidence in the ability of Westlands Water District to do this, as opposed to the Department of the Interior. And that is not a criticism of the Department of the Interior, necessarily. But, as we have talked about, it requires appropriations, it requires authorizations, and even if we are talking about only the ceiling, \$570 million, we are still going to be fighting every year to get that money appropriated, or we are going to be in court, fighting for the judge to order the Department of the Interior to spend up to that ceiling.

We have an expectation of what we will do to manage drainage service. It will vary from place to place, depending upon the circumstances. We have the ability to pay for it. And we are confident that we will be able to do it more quickly, more effectively, more efficiently than the Department of the Interior. We have a 50-year history with the Department of the Interior; it has not happened.

Mr. LAMALFA. OK. Quickly, if nothing is done, what do you see as the longer-term impact on agricultural production in your area?

Mr. BIRMINGHAM. The purpose of providing drainage is to protect the arability of the land. To say the solution is to retire 200,000 acres, that is inconsistent with the purposes of providing drainage service.

If drainage service is not provided, if we do not find a solution, more and more land will become sterile. We will not be able to irrigate it. There are areas all over the world—the fertile crescent is no longer fertile because of drainage problems.

Mr. LAMALFA. Thank you. Mr. Bezdek, if this settlement is not affirmed by Congress and the government is exposed to the full cost—well, first, let's settle the number. We heard a number \$513 million as some kind of cap number, but you still contend that the full exposure would be \$3.8 billion. Which number are we dealing with here?

Mr. BEZDEK. The San Luis authorization has an authorized ceiling, and we believe that that is \$500 million and change to reach the authorized ceiling. Our view, however, is that, given the order of the court, that we have an absolute obligation to provide drainage, that we believe there are significant risks, that the court will not stop at that authorized ceiling, and it will continue to order us to provide drainage. If that is the case, then we are talking \$3.8 billion.

Mr. LAMALFA. If Reclamation is required to meet this responsibility, how long would it take for Reclamation to get a project done?

Mr. BEZDEK. Of this scope and magnitude, it would depend entirely upon appropriations, and how often they would come in and what amounts, it would take a number of years, sir, a number of years.

Mr. LAMALFA. Longer than the partnership would be with Westlands doing so, is that right?

Mr. BEZDEK. I would say that is a safe assumption. Yes, sir.

Mr. LAMALFA. Yes, OK. Mr. Chairman, I will yield back.

Dr. FLEMING. Mrs. Torres is recognized.

Mrs. TORRES. Thank you, Mr. Chairman. Indeed, California is in the house whenever we talk about water. However, I am from Southern California, where we have to deal with a lot of the same issues, salinity and the water. I represent a district that had a lot of farming and dairies. Most of that is gone now.

Mr. Brown, when you talked about reducing water by 25 percent, over what period of time and is that reduction solely by residential customers, or who is responsible for this 25 percent reduction?

Mr. BROWN. I am a little at a loss here as to what you are talking about, exactly—are you talking about amounts that have been conserved within my service area?

Mrs. TORRES. Yes, that was your testimony, correct?

Mr. BROWN. No. I think the testimony that I was giving was relative to the 25 percent reduction in the total supply that Westlands would be allowed to take out of the CVP.

Mrs. TORRES. Oh, OK.

Mr. BROWN. Sorry if there is any confusion.

Mrs. TORRES. Thanks for that clarification.

Mr. Bezdek, the Inspector General investigation, can you explain what that is, what that entails?

Mr. BEZDEK. I am sorry, ma'am, other than the information that we put in our testimony, I really have nothing else to add to it.

Mrs. TORRES. Is that classified information that you are not able to share in the committee?

Mr. BEZDEK. It is just information they have chosen not to share with me.

Mrs. TORRES. They have chosen—OK.

[Laughter.]

Mrs. TORRES. I apologize if I put you in a bad position here.

Back to Mr. Brown. You have no drainage ability right now, is that right?

Mr. BROWN. We are a water supplier to municipal industrial customers. We have wastewater agencies that treat and discharge into the river in our area. But we are not responsible for those discharges.

Mrs. TORRES. OK. I am going to yield the rest of my time to Mr. Costa.

Mr. COSTA. Thank you very much, my fellow colleague.

Mr. Bezdek, what happens if this agreement is not ratified, in terms of the implications for the endangered species recovery?

Mr. BEZDEK. If this agreement is not ratified, as we have discussed already, Congressman, there will be just a tremendous drain on the Bureau of Reclamation's budget, and our ability to do good things in the environment will be potentially severely hampered. In terms of habitat, in terms of in-stream flow, in terms of species management, we have concerns that there will be impacts on our ability to do good things for the environment.

Mr. COSTA. Thank you.

Mr. Brown, I have a lot of respect for the work you do on behalf of the Contra Costa Water District, and your desire to enlarge the Contra Costa Reservoir. Los Vaqueros is to be applauded. We all need to try to address all the water tools in our water toolbox to fix our broken water system. I hope you are supportive of other efforts to use other water tools, including increasing storage capacity, whether it be at Shasta Lake or Sites or looking at Temperance Flat, because we want you to have a reliable water supply in the Contra Costa Water District. Do you support those other efforts?

Mr. BROWN. We support storage projects in California, yes.

Mr. COSTA. Good, I am glad to hear that. You talked about land that ought to be taken out of production. I made the case that food and fiber is a national security item. I don't know what your expertise is, but how much land do you think we should take out of production in California?

Mr. BROWN. I don't have a particular opinion about that—

Mr. COSTA. Well, no, you do have an opinion. You said 100,000 acres was not enough. So is it 300,000? Or should it be all of Westlands?

Mr. BROWN. I have an opinion that the 100,000 acres is inadequate, yes. I think—

Mr. COSTA. Eight hundred thousand?

Mr. BROWN. No, I said 100,000.

Mr. COSTA. OK. So, what is the magic number, two? Three? Four hundred thousand?

Mr. BROWN. The Bureau of Reclamation has already identified that it should be at least 194,000, and the USGS said it could be 308,000—

Mr. COSTA. But the Bureau of Reclamation settled on 100,000 acres after a negotiated agreement. You have been in negotiated agreements, right?

Mr. BROWN. Yes, I have.

Mr. COSTA. OK. So, they start at one number, 300, and they negotiate to 100,000. That is a negotiated agreement.

Mr. BROWN. I applaud Mr. Birmingham. He is an excellent negotiator. But I am not so sure the Bureau has protected our interests, though.

Mr. COSTA. Well, I applaud all—because these are hard.

Mr. BROWN. Yes, they are.

Mr. COSTA. They were hard in the San Joaquin River Settlement Agreement, they are hard here. And they are always difficult. And it is a compromise.

My time is expired, Mr. Chairman, but I thank you. And I thank the gentlewoman.

Dr. FLEMING. I thank the gentleman. The gentlewoman has yielded. Mr. Denham is recognized.

Mr. DENHAM. Thank you, Mr. Chairman. First, just a comment. I find it interesting that while I did not support the San Joaquin Restoration Settlement, the chief negotiator, this is very, very similar. There seems to be a little bit of hypocrisy here in dealing with our current situation on drainage.

Mr. Birmingham, can you talk about the Kesterson Reservoir tragedy—what happened there, who was in charge?

Mr. BIRMINGHAM. The simple answer to your question is it was the Department of the Interior. The Kesterson Reservoir had originally been designed as a set of regulating reservoirs in anticipation of completing construction of the master drain to the Delta.

When the construction of the drain stopped, Kesterson became the terminus of the reservoir. But the U.S. Fish and Wildlife Service said, "Since we are going to have these reservoirs, let's turn the area into a wildlife refuge." And, as a consequence, the bioaccumulation of selenium, which no one is going to dispute was a very serious problem, resulted in the types of deformities and the death that the Ranking Member was referring to. But it was the Department of the Interior that was responsible for the decisions made related to Kesterson Reservoir.

Mr. DENHAM. Thank you. Obviously, this is an ongoing frustration. We ought to be addressing more water storage. But it has certainly been frustrating that, yes, these settlements come up, the Federal Government does not do its job, whether it is providing the infrastructure for drainage, or fish ladders, or you name it. On a number of these settlements, we end up not only with a huge challenge, but our water gets shut off, as well.

Now, some people in our state, some people around the country, tend to overlook that. But in our area, when you see people unemployed, when you see farmers that have been generational that are now losing their farms, it is a real issue. It is something that hits home.

Mr. Bezdek, to your knowledge did the U.S. Department of Justice and the Department of the Interior negotiate that one of the key safeguards of the Westlands agreement is that if Westlands fails to manage drainage in their boundary they could lose their water contract?

Mr. BEZDEK. Yes, sir. That was negotiated by our team, which included representatives from the Department of Justice, as well as the Office of the Solicitor and the Department of the Interior.

Mr. DENHAM. Thank you. I yield back.

Dr. FLEMING. The gentleman yields back. Mr. Zinke is recognized.

Mr. ZINKE. Thank you, Mr. Chairman.

Chairman Barnes, as you know, this compact is critically important to Montana and all concerned. We also noticed concern as expressed by Chairman Bishop in Congress about the OMB assessment. There are some cost concerns. But as you pointed out in your written testimony, that litigation, if it continues, then the settlement does not become law. Could you expand further on the importance of moving forward on this settlement and settling these claims rather than allowing this litigation to continue?

Mr. BARNES. Thank you, Representative Zinke. Yes, as you noted in your opening statement, and very generously and eloquently, that we are warriors, it is in our DNA, as witnessed by the recent Elouise Cobell Settlement case. There are a lot of other Elouise Cobells on the Blackfeet Reservation.

I personally know that no good ever comes out of litigation. It becomes a settlement that neither party appreciates, neither party generally has a whole lot to do with the ultimate settlement.

We, of course, would press our case. I was trained as an electrician, and I worked as a journeyman electrician, and ultimately as a contractor. I negotiated contracts. With no disrespect to the law trade, we realize that the highest paid nonproductive journeyman on the job was an attorney.

[Laughter.]

Mr. BARNES. As I said, I say that with no disrespect. But it becomes money spent that does not go to the benefit of either party. But we would press our case, understanding, of course, that \$260 million in this settlement is unfunded Federal programmatic responsibility.

So, we would first press our case on that trust responsibility of the Federal Government's lack of carrying out those changes, and regular routine maintenance things that have been deferred because of budget constraints. So, that is our first, and that is over half of the settlement, just in things that were not done, but that we rolled into this in the interest of settlement. Then we would go back on the other issues of claims.

For the Boundary Treaty of 1907, the Blackfeet were not at the table, nor were we invited. That settlement between Canada and the United States did not take in concerns of the Blackfeet interests, and that certainly is probably the largest issue in here.

And, we as Blackfeet today, have come to realize that if we are not at the table, we are on the menu. We refuse to be on the menu. Going forth we want to be at the table at our rightful place on a government-to-government basis. So, we are not demanding trust responsibility, we are demanding input upon our future.

We have the Milk River project which really is for the downstream users. That whole irrigation project and diversion was not to the benefit of the Blackfeet, it was to the benefit of our downstream Montana users. I do not begrudge them their need for irrigation for their croplands and ranchlands, but again we were not at the table on that.

A lot of the settlement has to do with that. We have more clearly defined all of the claims in our written testimony. There are a lot

of right-of-way issues there. We would rather not fight those. We are prepared to if we need to. As you well know, a warrior's main responsibly is to always be prepared, and we are. We would rather go with the negotiated settlement, and negotiations were very tough. I do not necessarily agree with everything that the Department has put in front of us, but we did for the betterment of the entire settlement, which not only affects the Blackfeet Tribe and the Blackfeet people, but all of those downstream users, as was pointed out.

We are the headwaters, you know? We are the source water of that, and we aim to find justice in this settlement. We understand the wording that we were not appreciative of. It seems counter-statements in the same sentence that we agree in support, but—that famous “but”—now that has caused a tremendous amount of consternation.

I want the Department to fully agree and support this. Now, if they need to go back to OMB, I would encourage them to go down there this afternoon and get this thing resolved because, quite honestly, we gave as much as we can, Representative Zinke.

Mr. ZINKE. Thank you. And, Mr. Chairman, the headwaters also go down to Louisiana.

[Laughter.]

Dr. FLEMING. Yes. Frankly, being from Louisiana, we would love to give you at least half, maybe two-thirds, of our water any time.

[Laughter.]

Dr. FLEMING. If we can get it to you, we would. Trust me on that.

Well, I thank all the witnesses. It was a very interesting debate—a lot of, I think, well-intentioned ideas and certainly serious questions, and a lot of great work, and we appreciate that.

I want to thank the staff for the great job they do in subcommittee, as well.

We may have further questions in writing, so we will hold the record open for 10 days. In case we do deliver more questions to you, we ask that you would respond in writing, as well.

So, therefore, there being no other business, and without objection, we are adjourned.

[Whereupon, at 12:26 p.m., the subcommittee was adjourned.]

